

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, JANUARY, 1840.

LANG ET AL. *vs.* THEIR CREDITORS.

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January, 1840.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

LANG ET AL.
vs.
THEIR CREDIT-
ORS:

An opposition to the provisional tableau filed by a syndic, comes too late when ten days have expired after the order of publication, and when judgment of homologation has been *pronounced*, although it be *not signed*.

A new trial will not be granted when a party has neglected to file his opposition to a tableau until judgment of homologation has been pronounced, even if he presents himself, and moves for it before judgment is signed.

This appeal comes up on a bill of exceptions taken to the judgment of the court, refusing the appellant, William R. Carnes, who claims to be a privileged creditor of the insolvents, to file his opposition, and to grant a new trial.

The record shows that the syndic of the creditors of the insolvents, filed his tableau of distribution, and publication was made on the 16th of November, 1838. On the 28th of

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the same month, judgment of homologation was pronounced so far as the tableau was not opposed. On the 30th, and before this judgment was signed, William R. Carnes, a privileged creditor, offered to file an opposition to the tableau, which the judge refused, as coming too late.

The counsel of Carnes then took a rule on the syndic to show cause why a new trial should not be granted, and the judgment of homologation set aside.

Bills of exception were taken to the decision of the judge refusing leave to file the opposition, and overruling the application for a new trial. The opposing creditor appealed.

Greiner, for the appellant, insisted, that as no personal notice of filing the tableau had been given to the opposing creditor, he was not precluded from filing his opposition. 2 *Moreau's Digest*, 434, section 35. *Louisiana Code*, 3054, Nos. 2 and 4. 7 *Martin, N. S.*, 425.

2. The opposition was in time; and it may be filed at any time before judgment of homologation is signed. 9 *Louisiana Reports*, 48. 6 *Martin, N. S.*, 654.

3. There is no legal proof of publication. The newspaper should have been produced in evidence, showing the advertisement, and the date of publication. In this case the syndic's counsel testifies, that he caused the advertisement to be inserted in certain papers. 11 *Louisiana Reports*, 483.

Haynes, for the syndic, contended, that personal notice was not required to be given to creditors. The publication in this case was made in two newspapers, and duly proved. The opposition came too late, after the expiration of ten days from publication.

Martin, J., delivered the opinion of the court.

In this case, Carnes, a creditor of the insolvents, opposed the provisional tableau of distribution, filed by the syndic, after its homologation, but before the judgment, ordering it to be homologated, had been signed. The judge refused leave to the creditor to file his opposition; and he then moved for a new trial, which was refused, when the present appeal was taken.

Our attention is drawn to a bill of exceptions taken to the refusal of leave to file the opposition; the judge being of opinion that it was offered too late.

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The counsel of the appellant relies on the case of Longbottom's executor *vs.* Babcock et al., 9 Louisiana Reports, 48, in which we held, that the article 1004 and 1008 of the Code of Practice, require that opposition should be made to an executor's or curator's account, within *three* days after filing it; but it does not prohibit the making of opposition *after the lapse* of three days, and before the final judgment of homologation of the account. That case was an opposition to an executor's tableau filed *after the legal delay*; and we said, *arguendo*, that as a general rule, "when an act is to be done within a given time, as the filing an answer and the like, it may be done afterwards, if nothing occurs to prevent it. Thus, if a judgment by default has not been taken, an answer may be put in to the merits, although more than ten days have elapsed from the service of citation." The case relied on, differs from the present in this: that nothing had been done since the expiration of the legal delay; while in the present, a judgment was pronounced.

The case of Chiasson's Heirs *vs.* Dupuy et al., 9 Louisiana Reports, 57, is next cited, in which we recognized the principle laid down in the preceding case.

Lastly, the case of Avart *vs.* His Creditors, 6 Martin, N. S., 652, is said to be conclusive on the question under consideration. The marginal note is: "Creditors may oppose the tableau of distribution at any time previous to the judgment of homologation being *signed*." The facts of that case are: In December, 1825, a partial tableau had been filed, which was homologated in January following. In April, 1827, judgment of homologation not having yet been signed, an additional tableau was filed; and in July following, judgment, homologating the first tableau, was signed; but on the filing the second tableau in April, one of the creditors had made opposition thereto on grounds relating to both tableaus, principally to the rank of another creditor, placed as a privileged one on both tableaus. The opposition being over-

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ruled, the opponent appealed. The judgment was reversed in this court, and the case remanded, with directions to determine on the opposition.

It was urged, that the first tableau had been homologated in the presence of the opponent, after an amendment, which he provoked, without his opposition to any other part; therefore, his opposition could not be received.

On the part of the appellant, it was replied, that the judgment of homologation was interlocutory, and did not form *res judicata*; and if it be otherwise, the opposition was in time, before the judgment of homologation was signed. We expressed a doubt whether such judgments are interlocutory or final; but thought they could not be considered as final, until signed.

It does not appear to us that the marginal note is supported by the decision, which appears to us to be, that the place of the creditor amongst the privileged ones, was not conclusively settled by the homologation of the first tableau, which, at the time it was contested, was not yet signed.

An opposition to the provisional tableau filed by a syndic, comes too late, when ten days have expired after the order of publication, and when judgment of homologation has been pronounced, although it be not signed.

A new trial will not be granted when a party has neglected to file his opposition to a tableau until judgment of homologation has been pronounced, even if he presents himself and moves for it before judgment is signed.

The law fixes a delay, within which opposition to a tableau of distribution is to be made: that delay is not, however, fatal, as long as proceedings are suspended; but, when judgment of homologation is pronounced, creditors, who deem themselves injured by it, cannot be relieved, otherwise than by a new trial; and this cannot be obtained by a party who has neglected to file his opposition, until the judgment of homologation be pronounced. If it were otherwise, the final homologation of the tableau could be indefinitely protracted by creditors coming one after the other, and claiming a new trial, till judgment be actually signed.

The case of *Avart vs. His Creditors*, establishes only that in an opposition to a second tableau, the creditor may be relieved as to the property distributed therein, from any injury he may have sustained in the first, especially when he has urged his claim to relief before the judgment homologating the first tableau be signed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The judgment of homologation of a tableau of distribution, so far as it settles the rank and privilege of creditors is final, and must have the authority of the thing adjudged.

A creditor placed on the first tableau without a privilege, cannot, on the filing of a second, claim a privilege, because the funds on which he seeks to enforce his privilege, have been carried to the account of the mass of the ordinary creditors, at the head of the second tableau.

The opponent, Carnes, claims to be a privileged creditor on the proceeds of furniture sold at the sale of the insolvent's property.

When the first tableau was presented by the syndic, and duly advertised, Carnes presented his opposition, claiming to be a privileged, instead of an ordinary creditor. But the ten days after publication having elapsed, and judgment of homologation pronounced, although not signed, the opposition was rejected. His rank was settled on the tableau as an ordinary creditor by a final judgment of this court.

On the filing of the second tableau, Carnes again presented his opposition, and prayed to be recognized as a privileged creditor, on the proceeds of the sale of certain furniture, which he alleges is still on hand and not distributed, and has been carried to the account of the mass of the ordinary creditors, at the head of the second tableau. The opposition was rejected, and the opponent, Carnes, appealed.

Greiner, for the appellant.

Haynes, contra.

Morphy, J., delivered the opinion of the court.

W. R. Carnes, a creditor of the insolvents, is appellant from a judgment of the District Court, dismissing his oppo-

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sition to a final tableau of distribution. He complains, that he is therein set down as an ordinary creditor, while he is entitled, as he alleges, to the vendor's privilege on five hundred and forty-four dollars, that sum being the proceeds of some furniture by him sold to the insolvents, and found in their possession at the time of their failure. We think that the court below did not err. It appears, that in a first or provisional tableau, this sum figures among the assets of the estate, as resulting from a separate sale of furniture, made at the instance of the appellant, but that the syndic, refusing to recognize the privilege he now contends for, did not place it among the privileged claims. The latter amounted to one thousand eight hundred and eighty-four dollars and forty-one cents, leaving, for the ordinary creditors, a balance of one thousand four hundred and seventy dollars and thirty-two cents. Carnes opposed the homologation of the tableau, claiming to be privileged, on the proceeds of the furniture, but his opposition, being too late, was overruled by the district judge, whose decree was affirmed by this tribunal, on an appeal brought up by the present appellant.

The judgment of homologation of a tableau of distribution, so far as it settles the rank and privilege of creditors, is final, and must have the authority of the thing adjudged.

A creditor, placed on the first tableau without a privilege, cannot, on the filing of a second, claim a privilege, because the funds on which he seeks to enforce

It has been repeatedly held, in this court, that a judgment of homologation, so far as it settles the rank and privilege of the creditors, is final, and must have the authority of the thing adjudged. *Louisiana Insurance Company vs. Campbell*, 6 *Martin, N. S.*, 133. *Mayfield vs. Comeaux*, 7 *Martin, N. S.*, 183. *Ory vs. His Creditors*, 12 *Louisiana Reports*, 122. But the appellant insists that he is yet in time to urge his privilege, because no distribution has been made of the amount on which he claims it: that the evidence shows the balance of one thousand four hundred and seventy dollars and thirty-two cents of the former tableau to be yet in the hands of the syndic: and finally, that said tableau was irregular and defective, inasmuch as the said balance is carried to the credit of the mass of the ordinary creditors, without their names or claims being set forth, as required by law. We do not perceive how the fact of no distribution having been made of the funds declared to belong to the mass of the ordinary creditors, or the irregularity pointed

out in the former tableau, can, in any way, help the appellant in establishing the privilege he now seeks to obtain. EASTERN DIST.
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His opposition to the first tableau was for the sole purpose of obtaining, among the privileged creditors, a rank which had been denied him. The final judgment, dismissing his opposition, forms an insuperable bar to his renewing any claim for a privilege on the balance at the foot of said tableau, irregular and defective as it may be in other respects. Even if the present appellant had succeeded in raising in our minds some doubts as to the correctness of the former judgment, we could not touch it. *Res judicata pro veritate accipitur.*

As to the new assets, the distribution of which the court below is now called upon to regulate, they do not include any portion of the proceeds of the separate sale of the goods alleged to have been sold by Carnes to the insolvents; the appellant has, consequently, shown in them no privilege or cause of preference whatever.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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his privilege have been carried to the account of the mass of the ordinary creditors, at the foot of the second tableau.

HUBBELL VS. READ.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
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Partners doing business as "wood merchants, and running drays for hire," constitute a commercial partnership, and are bound *in solido* for the obligations of the firm.

This is an action on a promissory note against Lewis A. Read, one of the firm of Skeels & Read, as endorser. The note is drawn to the order of, and endorsed by, the firm of Skeels & Read.

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According to an agreement of counsel, in the record, it is admitted that Skeels & Read were "*partners as wood merchants and in running drays for hire.*" Judgment was rendered against Read, *in solido*, on the endorsement of the firm, and he appealed.

Harrison, for the plaintiff.

Lockett, contra.

Morphy, J., delivered the opinion of the court.

The defendant and appellant is sued as one of the firm of Skeels & Read, for an endorsement of the firm, on a note of four hundred dollars. An agreement of counsel is appended, at the foot of the record, submitting, as the only question in the case, whether Read is bound *in solido*; the defendants, Skeels & Read, being partners as wood merchants and in running drays for hire. The very words of the question propounded, hardly leave any room for doubt or deliberation; for, if the partners are merchants, as they are thus admitted to be, they must be supposed to carry on those dealings which are peculiar to, and most common among merchants, and which, under article 2796, of our Code, characterize commercial partnerships. It matters not whether those dealings are confined to one, or extend to every kind of personal property; it is the act of buying and selling those things that the partners trade in, which stamps a mercantile character on their partnership; such, we cannot but believe, must have been the business and dealings of Skeels & Read, as wood merchants. They must, therefore, be viewed as commercial partners, and held liable *in solido*. The semblance of a defence, exhibited in this court, throws but too thin a veil over the real nature and object of this appeal, to protect the appellant from the damages prayed for by the appellee.

Partners doing business as 'wood merchants, and running drays for hire,' constitute a commercial partnership, and are bound *in solido* for the obligations of the firm.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per cent. damages on the amount of the note, and costs in both courts.

GOSSETT VS. CASHELL.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE PARISH OF ASSUMPTION, JUDGE COOLEY, THEN OF THE FOURTH DISTRICT, PRESIDING.

GOSSETT
VS.
CASHELL.

An appeal lies from an interlocutory judgment, setting aside a writ of sequestration.

The surety in a sequestration bond must reside, and have his domicile in the parish where the suit is instituted, or the sequestration may be set aside.

This is an appeal from a judgment of the District Court, setting aside the sequestration, because the surety in the bond did not reside within the jurisdiction of the court, as required by law. The facts are, that the suit was instituted in the parish of Assumption, in which the plaintiff obtained an order to sequester the crop, then growing on the defendant's plantation.

The defendant being absent, a curator *ad hoc* was appointed, who moved the court to set aside the sequestration, on the ground that the surety in the sequestration bond was not domiciliated in the parish.

It was shown, that the surety resided in the parish of St. James, at the time and since signing the bond. There was judgment ordering the writ of sequestration to be set aside, and the plaintiff appealed.

Ilisley, and *Nicholls*, for the appellant.

Taylor, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from an interlocutory judgment setting aside a writ of sequestration. It is contended that an appeal does not lie in this case, because the judgment is not final, and works no irreparable injury. This question is not *res nova*, and was settled in the case of the "*State vs. Judge Lewis*," 9 Martin, 301, in which we held, that this objection was not a sufficient cause for the discharge of a *mandamus nisi* to the judge of the first district.

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The sequestration was set aside on a suggestion that the surety in the bond was not domiciliated in the parish.

It appears that this suit was brought in the parish of Assumption, and there is an admission in the record that the surety resides in the parish of St. James. According to the *Louisiana Code*, article 3011, and the Code of Practice, article 276, the surety should be a resident, and have his domicile in the parish of Assumption.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Where the notary certifies that "notices of protest were served on the endorsers, by letters delivered to them, personally, by L.," etc., it is insufficient. The notary cannot certify what was done by another, so as to bind the endorser.

This is an action against the maker and endorser of a promissory note, protested for non-payment.

The parish judge, acting as notary, certifies, that "notices of protest were served on the endorsers of the note, by letters to them delivered personally; one to William Jones, by Mr. F. T. Laizer, &c." Jones was the endorser sued, and denied that he had been legally notified of protest and non-payment of the note.

There was a verdict and judgment against the defendants, Jonte and Jones, *in solido*, and they appealed.

McKinney, for the plaintiff.

Wills, for the defendant.

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Bullard, J., delivered the opinion of the court.

This case is perfectly clear against the drawer of the promissory note ; but we think the plaintiff has failed to prove the liability of the endorser. The notary certifies that "notices of protest were served on the endorsers, &c., by letters to them delivered, personally ; one to William Jones, by Mr. F. T. Laizer, and one to Shepherd, by Mr. Edward Buisson," &c. If the notary had certified the manner in which he had served the notices, it would have been good evidence under the statute ; but he cannot certify what was done by others out of his presence.

The judgment is, therefore, affirmed, as to the defendant, Jonte, with costs, and ten per cent. damages ; and reversed as to William Jones, and judgment is rendered in his favor, as in case of a non-suit, with costs, in both courts.

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RABY vs. BROWN.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF IBERVILLE, THE JUDGE OF THE SECOND DISTRICT PRESIDING.

Where the cause had been laid over, from day to day, until the last day of the term ; when it was taken up, the defendant's counsel moved for attachments for his absent witnesses, and that the cause lie over until the attachments be returned : *Held*, that the party must either proceed to trial, or disclose and show the materiality of the testimony of the absent witnesses.

This is an action to recover a sum of money on a written contract, signed by the defendant, in which he engages to purchase and pay for a crop then growing on his own land, but made by the plaintiff.

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The defendant pleaded various matters in defence, and reconvened in damages.

The following term of the court, after the cause was at issue, it was laid over, from time to time, until the last day of the term, when it was called up for trial.

The defendant's counsel (he being absent) moved for attachments, returnable instant, to bring in two witnesses residing in the parish, and that the trial be suspended until the attachments were returned. The judge presiding refused to wait, and ordered the trial to proceed, unless the party disclosed what he expected to prove by said witnesses. The defendant's counsel answered that they could not make such disclosure, as the defendant himself was absent. The judge ordered the trial to proceed, on the grounds that the cause had been assigned for trial, and postponed from day to day, though not from the fault of the parties, but from the press of business; that, as the court was about to close its term, it was useless to issue attachments for the witnesses, because the court would be adjourned before a return could be made; that, in ordinary cases, in the commencement of the term, when the attendance of witnesses could be procured, an attachment would be allowed, and the trial delayed, without compelling the party to disclose what he expected to prove, &c. The defendant's counsel excepted to the decision of the court ruling them to trial.

Judgment was rendered in favor of the plaintiff for part of his demand, and the defendant appealed.

Burke and Taylor, for the appellant.

Edwards, contra.

Morphy, J., delivered the opinion of the court.

This suit has been brought on certain articles of agreement to recover of defendant the purchase money of a sale to him made by plaintiff. Various matters were set up in defence and damages claimed in reconvention for a breach of the contract sued on.

Our attention has been called to a bill of exceptions which presents the only question in the cause, to wit : whether the defendant was properly ruled to trial in the court below.

On the last day of the term, this case, which had been postponed from day to day, came on for trial, when defendant's counsel caused two of his witnesses to be called. They not appearing, he exhibited summonses regularly served on them, prayed for an attachment, and moved that the case be laid over until the return of the attachment. The court considering that this course amounted to a motion for a continuance, because no return could be expected before its adjournment, decided that defendant should proceed in the trial, or disclose the facts which he expected to prove by his absent witnesses. The defendant's counsel stated that the course suggested by the court could not be complied with, defendant not being present, and his counsel not being informed of the evidence expected of the witnesses. We think that the court did not err. Had the motion been one for continuance *eo nomine*, the court, before granting it, should have been satisfied of the materiality of the evidence wanted, and it would have been incumbent on the party or his counsel, to be ready in court, to make the necessary oath. To permit the course attempted to be pursued here, would be to permit an evasion of all those articles of our Code of Practice which require a party to show the necessity of further delay, before he can entitle himself to a continuance. The mere act of taking a *subpoena* from the clerk, and handing it to the sheriff, does not, in any way, show the necessity or materiality of the testimony of the witnesses summoned.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the cause had been laid over, from day to day, until the last day of the term ; when it was taken up, the defendant's counsel moved for attachments for his absent witnesses, and that the cause lie over until the attachments be returned : *Held*, that the party must either proceed to trial, or disclose and show the materiality of the testimony of the absent witnesses.

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ETC., AND EMILIE
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BLOIS, TUTOR, ETC., AND EMILIE DEMOURELLE VS. YARD &
BLOIS'S SYNDICS.

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BUCHANAN PRESIDING.

Creditors having claims against property surrendered by the insolvents, will not be permitted to litigate their demands separately against the syndics, but will be required to cumulate them with the insolvent proceedings.

In this case, Yard & Blois having made a surrender of their property, syndics were appointed by the creditors. Thomas Blois, one of the insolvents, as tutor of his minor son, claimed to be a privileged creditor, for a large sum, on the property surrendered; and also his second wife, Emilie Demourelle. They each instituted separate suits against the syndics, who denied their right to recover. The wife was declared to have a privilege, and the syndics appealed.

The case of Blois, tutor of his son, was also submitted to the court, on the question of privilege alone, which was decided in the negative, and the plaintiffs appealed.

Carter, for the plaintiffs.

Lockett, contra.

Bullard, J., delivered the opinion of the court.

In these two cases, the plaintiffs, being the wife and pupil of one of the firm of Yard & Blois, sue the syndics as privileged creditors. The facts are set forth vaguely, and any judgment which this court might pronounce, would be hypothetical. The other creditors are not before us, and the rank of the plaintiffs can only be settled contradictorily. The proceeding, in our opinion, is irregular, and these suits ought to have been cumulated with the proceedings of Yard & Blois vs. Their Creditors, and the amount due the plaintiffs, as well as their relative ranks, as creditors, ascertained in the usual way, on an opposition to the tableau of distribution.

It is, therefore, considered by the court, that the two judgments be reversed; the appellees paying costs of the appeal respectively. And it is further ordered, that these cases be remanded to the District Court, and cumulated with the proceedings in the case of *Yard & Blois vs. Their Creditors*, with a view to further proceedings, according to law.

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MORRIS ET AL. VS. KEMP.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. HELENA.

A sale of property inherited by a minor, ordered by a family meeting not convoked for that purpose, and which is not shown to be necessary, is null and void, and will be set aside, on an opposition to a monition for its confirmation.

A family meeting, convoked for specific and different purposes, is without authority to order a sale of property inherited by a minor, whose interests they are called on to protect.

This is an appeal from a judgment of the Court of Probates of the parish of St. Helena, homologating and confirming the probate sale of a tract of land to the defendant. The facts show, that Margaret M. Morris was the wife and surviving widow of Presley Stephenson, deceased, and administratrix of his succession; and also natural tutrix of a minor daughter, sole issue of the marriage. She afterwards married one A. R. Morris, and presented a petition to the probate judge, praying that "a family meeting, composed of the relations and friends of her minor daughter, be convoked, to deliberate on the propriety of retaining her in the tutorship, and also to deliberate on other matters relating to the administration of said estate."

A family meeting was convoked, accordingly, which confirmed the petitioner as tutrix, and her husband as co-tutor, of her minor daughter, and appointed J. K. Gorman under

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tutor, and administrator of the estate of Presley Stephenson, deceased. The meeting further declared, that the estate was indebted ten thousand, seven hundred and fifty-five dollars, and ordered that it be sold, at probate sale, on certain terms and conditions.

The proceedings of this family meeting were homologated, and the sale of the property decreed, by the Probate Court, accordingly. At the sale, Merrit G. Kemp became the purchaser of a tract of land, containing five hundred and forty acres, for the price of two thousand three hundred and ten dollars. He took out his monition to have the sale confirmed.

Mrs. Morris, as tutrix of her minor daughter, and assisted by her husband, made opposition to the sale, and prayed that it be annulled on the following grounds:

1st. That the sale of Stephenson's succession was not provoked by an administrator, or any person legally authorized; but only on the application of the widow to be confirmed in her office of tutrix, &c.; and that said sale is contrary to law, and illegal.

2d. Because there was no appraisement at the sale, and the property was adjudicated to the defendant, for less than its appraised value, in the inventory.

3d. That the order of sale was illegal, the forms of law not having been complied with, &c.; and, also, that the terms of sale are not complied with.

Upon these issues, made in the opposition to the order for the monition, the cause was tried. The judge of probates decided, that, as the order of sale was predicated on the deliberations of a family meeting, convened for the special purpose, it was legal; and that, although the minor child had an interest in Stephenson's succession, yet it was the sale of the property of the succession, and not that of the minor; that the estate was largely in debt, and nearly the whole of it community property; and that the purchaser had complied with the conditions of sale; that, therefore, the sale was legal, and should be homologated and confirmed. From this judgment the plaintiffs in opposition appealed.

Andrews, for the appellants.

Lawson, for the appellee.

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Bullard, J., delivered the opinion of the court.

This is a proceeding under the act of 1834, "for the further assurance of titles at judicial sales." The appellee procured from the Court of Probates a monition, calling upon all persons who might have any right, title or claim, of any nature and description whatever, &c., &c., to show cause why the sale and adjudication to him of a certain tract of land, belonging to the estate of Stephenson, made under the authority of said court, should not be affirmed and homologated.

The tutor of the minor heir of Stephenson came forward and made opposition to the homologation of the sale, on the following grounds :

1st. Because the order of the Court of Probates, in pursuance of which the sale was made, was unauthorized by law, not having been applied for, nor provoked by any person having a right to do so, either as administrator of the succession of Stephenson, or by the tutor or co-tutor of the minor heir.

2d. Because, even supposing the order was legally given, yet the property did not sell for its appraised value.

3d. Because the terms upon which the land was sold have not been complied with.

The administrator of the estate intervened, but it is not important to notice the recusation of the judge, contained in his opposition.

Upon looking into the proceedings which led to the alienation of the land in question, we find a petition of Margaret M. Morris, late widow Stephenson, to the Court of Probates, representing that, since she was confirmed as natural tutrix of her minor child, and administratrix of the estate of her late husband, she had contracted a second marriage with A. R. Morris, without calling a family meeting to decide upon their retaining the tutorship. She, therefore, prays that a family

A sale of property inherited by a minor, ordered by a family meeting not convoked for that purpose, and which is not shown to be necessary, is null and void, and will be set aside on an opposition to a monition for its confirmation.

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ESTATE.

A family meeting, convoked for specific and different purposes, is without authority to order a sale of property inherited by a minor, whose interests they are called on to protect.

meeting may be convened to deliberate on the propriety of retaining her in the tutorship, and also to deliberate on other matters relating to the administration of said estate. A family meeting was convened accordingly, and proceeded to advise that the property belonging to the estate should be sold. The advice of the family meeting was homologated, and the property was sold without regard to the appraisement.

Nothing shows, in our opinion, the necessity of the sale in question. The family meeting was convoked, for a different purpose altogether, and had no authority to direct a sale; nor does the record show that this was a case in which the property, belonging to minor heirs, could be sold without regard to an appraisement. We conclude, therefore, that the judge erred in overruling the opposition.

The judgment of the court of probates is, therefore, reversed, and, proceeding to give such judgment as should have been rendered below, it is further ordered and adjudged, that the sale of the land in question be rescinded and annulled, and that the appellee pay the costs of both courts.

M'KINNEY vs. BEESON'S ESTATE.

**APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

A simple denial of the plaintiff's right to sue as the holder of a negotiable instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or stolen.

In a suit against the maker of a note, it is no ground of defence that it was improperly transferred by the curator of an estate, to which it belonged, to the holder, when it is endorsed in blank.

This is an action against the maker of a promissory note, made payable to the order of, and endorsed in blank, by Messrs. Sloo & Byrne, and also by W. W. Stewart. The maker of the note, Amos Beeson, having died, suit was instituted against his widow, as partner in the community, and tutor to the minor children, and as representing the estate of the deceased.

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M'KINNEY
VS.
BEESON'S
ESTATE.

The attorney and agent of the widow Beeson, pleaded a general denial, and denied specially, that the note was ever transferred to the plaintiff by any one authorized to do so, or that he gave any consideration therefor; and avers, that he is not the *bona fide* holder or owner of the note. The defendant further avers that said note was given in part payment of a lot of ground, purchased at the sale of L'Hommedieu's succession. That said succession is administered by W. W. Stewart and one Rawson, as curators, who are still in office; that Stewart had no authority to endorse and transfer said note, which was done after it was over-due, and had been put into the hands of the plaintiff's brother as attorney, for the liquidation and settlement of L'Hommedieu's estate, to which it properly belongs; and that the plaintiff took it with a knowledge of these circumstances.

Under these pleadings and issues the cause was tried.

It was in proof, that the note was given in part payment of a lot purchased at the sale of L'Hommedieu's succession, which was administered by W. W. Stewart and one Rawson, both of whom are still the curators; that the plaintiff's brother was employed as the attorney of the curators for the settlement of L'Hommedieu's estate, and that these brothers reside together in the same house; that the note was transferred to the plaintiff after it became due, by Stewart, one of the curators, who endorsed it in blank, and has since left the state.

From the evidence thus adduced, the judge of probates was of opinion the plaintiff failed to prove that he came to the possession of the note in due course of trade, and for a valuable consideration, and that he must be non-suited. From judgment of non-suit the plaintiff appealed.

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M'KINNEY
VS.
BEESON'S
ESTATE.

Wills, for the plaintiff and appellant.

Eggleston and M'Caleb, for the defendant.

Morphy, J., delivered the opinion of the court.

This is an action by the holder of a promissory note against the estate of the maker. The answer sets up in defence divers matters, amounting, in substance, to a denial that the petitioner has any right to the note sued on; that it was ever legally transferred to him; or that he ever gave for it a *bona fide* consideration. Upon the evidence adduced in support of this defence, which was taken subject to all legal exceptions, there was a judgment of non-suit, from which the plaintiff has appealed.

A simple denial of the plaintiff's right to sue, as the holder of a negotiable instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or stolen.

A bare denial of a plaintiff's right to a negotiable instrument, which is put in suit, cannot of itself authorize the maker to investigate or contest his title to the same, when he holds by a blank endorsement, unless the note has been lost or stolen, which is not alleged in this case. The maker, who wishes to question the holder's right to it, must first show that he has an interest in doing so; for, if he has not, the question of ownership is one with which he has nothing to do. That interest may, and generally does, consist in preserving some equitable grounds of defence, of which he apprehends an attempt is made to deprive him, by an assignment, which is not *bona fide*. No such allegation is to be found in the answer, but on the trial some attempt was made to prove that the succession of L'Hommedieu, from whose curator the plaintiff holds the note, was largely indebted to the deceased, Beeson, and that there were accounts to be adjusted between the two estates. Granting that such be the fact, the defence would be but little aided by the admission, for it appears from the pleadings and documentary evidence, that the note sued on was given in part payment of a lot of ground, adjudicated to the deceased, Beeson, at the sale of the succession of L'Hommedieu, and that the estate is insolvent; no set off could, therefore, be pleaded by the defendant, had the action been brought by the curator of L'Hommedieu's estate. *Green vs. Davis et al.*,

7 Martin, N. S., 238. But it is contended, that Stewart, EASTERN DIST. January, 1840. one of the curators of L'Hommedieu's estate, could not legally transfer a note belonging to the same, or give it to the plaintiff in payment of his own debt, as one of defendant's witnesses testified has been done in this case. If such transfer, or use made of the note, be illegal and improper, as no doubt it is, the act has operated no injury to the defendant, and, therefore, affords him no just cause of complaint. The curator is responsible for the whole amount of the notes received from the sale of the succession of L'Hommedieu, and the creditors and other persons concerned, will no doubt look to his securities, if he fails to render a faithful account of them. On the merits, the plaintiff is entitled to recover, having made out his case.

DAVIS
vs.
COAN.

In a suit against the maker of a note, it is no ground of defence that it was improperly transferred by the curator of an estate, to which it belonged, to the holder, when it is endorsed in blank.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and this court, now proceeding to render such judgment as should have been given below, do order and adjudge, that the plaintiff do recover of the estate of Amos Beeson, the sum of one thousand and three dollars, with legal interest from the 25th of September, 1837, and costs in both courts, and that the property mortgaged, as set forth in plaintiff's petition, be sold to satisfy this judgment.

DAVIS vs. COAN.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS, JUDGE DUNCAN
PRESIDING.

A party pleading minority, and it is shown that he is near the age of majority, he must clearly make it appear that he was a minor at the time of the contract, or his plea will not avail him.

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DAVIS
vs.
COAN.

This suit is instituted on a promissory note executed by the defendant. The plea is, minority at the time of executing the obligation. The testimony is somewhat contradictory, but the judge presiding was of opinion it preponderated to the side of the defendant, rendered judgment in his favor, from which the plaintiff appealed.

Durell, for the appellant.

Briggs, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment sustaining the defendant's plea of minority. It was supported by one witness. A second witness was called, who disclosed the fact that an official record of the birth of the defendant existed, and upon objection being made to his testimony, he was ordered to stand aside. The plaintiff's counsel then moved that the whole of the testimony of the first witness be stricken out, at least so much thereof as went to prove the minority of the defendant by parole. This the judge refused to do, on the ground that the application came too late. The plaintiff then introduced a witness who deposed, that, a few months ago, the defendant told him that he was twenty-two years of age. That the defendant keeps a lottery office; has a sign over his door; and that the note sued on was given by him in the course of his business as a lottery office keeper.

A party pleading minority, and it is shown that he is near the age of majority, he must clearly make it appear that he was a minor at the time of the contract, or his plea will not avail him.

It is unnecessary to decide whether the judge *a quo* erred in rejecting the plaintiff's application. When a party is near the age of majority; is openly and publicly doing business as a person of full age, and gives himself out to the public as such, he must be held to very strict proof of his non-age. In the present case, the testimony of the first witness, is balanced, at least, by that of the second. The defendant has not even made probable, that which he was bound to make certain.

The plaintiff has fully made out his case, and is entitled to judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be annulled, avoided and reversed; and, proceeding to give such judgment as, in our opinion, ought to have been given in the court below, it is ordered, adjudged and decreed, that the plaintiff recover, from the defendant, the sum of four hundred and eighty-seven dollars and seventy-four cents, with legal interest from judicial demand, and the costs in both courts.

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January, 1840.

SAILLARD
VS.
TURNER ET AL.

SAILLARD VS. TURNER ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Want of amicable demand specially pleaded and shown, saved the defendant the costs of *the original citation*; and also those of appeal by reversing the judgment.

This is a suit, on a promissory note, against the maker and endorser. The defendants pleaded a general denial and want of amicable demand. The only evidence in the case is the protest, and certificate of the notary, of notice given to the parties. There is no proof of an amicable demand being made before institution of suit. There was a verdict and judgment for the amount of the note sued on, against the defendants, and they appealed.

Bodin, for the plaintiff.

Smith, contra.

Bullard, J., delivered the opinion of the court.

In this case the record contains no proof of amicable demand, the want of which is specially pleaded.

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January, 1840.

POLO & TIVILIER
vs.
NATILI ET AL.

It is, therefore, ordered, that the judgment be reversed, and that the plaintiff recover, of the defendants, *in solido*, eleven hundred and seventy-five dollars, with interest, at five per cent., from the 3d July, 1838, and four dollars, cost of protest, together with the costs of the Parish Court, except those of the original citation, and that the appellee pay the costs of appeal.

POLO & TIVILIER vs. NATILI ET AL.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

The vendor of personal property may produce evidence to show that the note sued on, was given for the *price of certain furniture*, to enable him to enforce his privilege against it in the hands of his vendee.

Where the defendants are interrogated as to the consideration of the note sued on, and neglect to answer, their silence must be taken *pro confesso* and it will be deemed full proof.

This is a suit against the maker and endorser of a promissory note, in which the plaintiffs had certain furniture sequestered in the hands of the defendants, on which they claim a privilege as vendors.

The defendants pleaded a general denial. The evidence shows that the plaintiffs sold a lot of furniture and rendered a bill of it to the defendants, amounting to six hundred and fifty dollars, for which they gave the note sued on. On the trial, evidence was offered to show this fact, which was objected to. Interrogatories were propounded to the defendants calling on them to state, that the consideration for which the note was executed, was the price of the furniture sold, and in their possession. They neglected to answer, and the interrogatories were taken for confessed. There was judgment for the plaintiffs, and the defendants appealed.

Culbertson, for the plaintiffs.

Preaux, contra.

Martin, J., delivered the opinion of the court.

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The plaintiffs claim from the defendants, as maker and endorser of a promissory note, its amount, with privilege on certain articles of furniture sold to them. The general issue was pleaded, and judgment was given to the plaintiffs according to the prayer of the petition. Our attention is first drawn to a bill of exception, taken by the defendants, to the admission of evidence of the note having been given for the price of the furniture, on which the privilege is asked, on the ground that the note was a novation of the debt contracted by the purchase of the furniture.

BRUMFIELD
vs.
MORTEE.

The vendor of personal property may produce evidence to show that the note sued on was given for the price of certain furniture, to enable him to enforce his privilege against it in the hands of his vendee.

It does not appear to us that the judge *a quo* erred. See *Louisiana Code*, article 3194, on which he relied in giving judgment sustaining the privilege.

On the merits, the defendants were interrogated as to the consideration of the note, which the plaintiffs allege to be the price of the furniture, and they neglected to answer these interrogatories. They must, therefore, be taken *pro confessis*. Judgment was correctly given against them, and the sale of the furniture ordered to be made in satisfaction thereof.

Where the defendants are interrogated as to the consideration of the note sued on, and neglect to answer, their silence must be taken *pro confessis*, and it will be deemed full proof.

It is, therefore, ordered, adjudged and decreed, that judgment be affirmed, with costs, and ten per cent. damages.

BRUMFIELD vs. MORTEE.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

There being no grounds on which to prosecute the appeal in this case, it was considered as taken for delay, and judgment confirmed with ten per cent. damages.

The defendant was sued on his promissory note, and set up various matters in defence against the payee. He also

EASTERN DIST. interrogated the plaintiff as to the ownership of the note, which showed that the plaintiff held it for the heirs of Jacob Ott, deceased. The interrogatories were not answered.

BRUMFIELD
vs.
MORTEZ.

The cause was submitted to a jury, on all the matters set up in defence, who returned a verdict for the full amount claimed. Judgment was rendered for the sum found, with five per cent. interest, and the defendant appealed.

Hennen, for the plaintiff, brought up an exemplification of the record after the return day, and prayed the affirmance of the judgment, with ten per cent. damages.

Penn, contra.

Morphy, J., delivered the opinion of the court.

This suit was brought on a promissory note of three thousand seven hundred and twenty dollars. The defendant, after setting forth certain grounds of defence, which he averred to have against the payee, propounded interrogatories to the plaintiff to show that he was not the owner of the note sued on. The neglect of plaintiff to answer the interrogatories, exhibited him, in the court below, in the light of a trustee of the real owners of the note, and opened to defendant all his alleged means of defence against the latter. The jury, who tried the cause, was satisfied that they were unfounded, and gave a verdict for the plaintiff; whereupon, defendant having failed to obtain a new trial, took this appeal.

The record is brought up by the appellee, and he prays for damages in this court.

The meagre testimony adduced on the trial, the repeated affidavits for continuance, and the neglect to bring up the record, so unusual when the suitor expects to obtain the least advantage by the appeal, leave no doubt in our minds that the present one is taken only for delay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages on the amount sued on.

BRUMFIELD *vs.* MORTEE.EASTERN DIST.
January, 1840.APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE
PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

BRUMFIELD
vs.
MORTEE.

When the dilatory proceedings in the court below, coupled with the absence of any defence, as set up, show the appeal is resorted to for delay, the judgment will be affirmed, with ten per cent. damages.

In this case the plaintiff obtained a verdict and judgment for the amount of his demand, with five per cent. interest thereon, and the defendant appealed.

The counsel for the appellee brought up the record, after the return day had expired, and prayed for the affirmance of the judgment, with damages, as for a frivolous appeal.

Hennen, for the appellee.

Morphy, J., delivered the opinion of the court.

In this suit, which is on a note of hand, the defendant propounded interrogatories to plaintiff to obtain the confession that he was not the owner of the note, but held it, and put it in suit for the payee, against whom he averred that he had good and equitable grounds of defence. The plaintiff having failed to answer, the defendant was let into the proof of the facts set up in defence, but he offered no evidence whatever to sustain them. Verdict was given for plaintiff, and defendant, after the ordinary motion for a new trial, appealed, but neglected to bring up the record.

The dilatory proceedings resorted to in the court below, and the absence of any testimony whatever, show, that no serious defence could be intended, and that this appeal is frivolous. The plaintiff must, therefore, have the damages he prays for.

It is ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

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January, 1840.

BRUMFIELD *vs.* CUNNINGHAM.

BRUMFIELD
vs.
CUNNINGHAM.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

Where the record is brought up by the appellee, and there does not appear to have been any valid defence, the appeal will be considered as taken for delay, and the judgment affirmed with ten per cent. damages.

In this case there was a verdict and judgment against the defendant, and he prayed an appeal, but failed to bring up the record.

The appellee filed an exemplification of the record after the return day, and prayed for the affirmance of the judgment below, with ten per cent. damages, as for a frivolous appeal.

Hennen, for the appellee.

Morphy, J., delivered the opinion of the court.

The defendant being sued on a promissory note, averred that he had given it in payment of a slave bought of the heirs of the late Jacob Ott; that the plaintiff had no right or interest in the note, the same having been collusively and fraudulently put in his hands by the real owners, the heirs of Ott, for the express purpose of depriving him of some equitable grounds of defence, which he sets forth at full length in his answer. In order to prove plaintiff's want of interest in the note, defendant propounded interrogatories, the answers to which prove conclusively that plaintiff is a *bona fide* holder for a valuable consideration. A verdict being rendered in favor of plaintiff, defendant made a motion for a new trial, which was overruled; he then took the present appeal.

The record was brought by the appellee, who prays for the affirmance of the judgment, with damages.

Affidavits for continuance at two successive terms of this court, and their neglect to bring up the record, coupled with

the absence of any valid defence, as to this holder, furnish abundant evidence of the nature of this appeal.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages on the amount of the note sued on.

CHOICE
VS.
HARBY ET AL.

CHOICE VS. HARBY ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The certificate of the clerk should state that the record "contains all the evidence adduced on the trial," or the appeal will be dismissed.

Vason, of counsel for the appellee, prayed for the affirmance of the judgment, with costs, and ten per cent. damages.

On examining the record, the clerk's certificate only stated that it contained a transcript of all the proceedings, as well as of all the documents, filed in the case, &c."

The judge certified at the end, that "the foregoing record contains *all the matters of fact*, upon which the cause was tried."

The case was submitted to the court on the record, and appellee's points filed.

Vason, for the plaintiff and appellee.

Kennicott, contra.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment against them, as maker and endorsers of a promissory note.

The certificate of the clerk attests, that the transcript contains all the proceedings and the documents filed in the case ;

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CLARK
vs.
GLOVER ET AL.

but it does not inform us that it contains all the evidence adduced on the trial. We are, therefore, unable to examine the case on the merits, and the appeal must, consequently, be dismissed, with costs in both courts.

CLARK vs. GLOVER ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
EAST FELICIANA, JUDGE SAUNDERS, PARISH JUDGE, PRESIDING.

An affidavit, in which the plaintiff states that "*he fears the defendant may remove the mortgaged slave out of the jurisdiction of the state,*" is insufficient to obtain an order of sequestration. He should *state the facts which induce his apprehension.*

This suit commenced by injunction. The plaintiffs in injunction, S. & T. L. Clark, allege, that in April, 1837, they endorsed a note of one James C. Shule, for two thousand nine hundred dollars, and took a mortgage on a small plantation, and some slaves, to secure them against their endorsement. That said note became due, and was protested for non-payment, and that judgment and execution thereon has been obtained against them, their property seized, and advertised for sale.

They further allege, that said Shule has removed to Texas, but left one of the mortgaged slaves in the possession of one Catherine Glover, and that they are informed and believe said Shule is about to remove said slave out of the state of Louisiana; and pray that it be sequestered; its value being about five hundred dollars.

In a supplemental petition, the plaintiffs allege, there is another of the mortgaged slaves in the hands of Slaughter & Badger, of Port Hudson, worth one thousand dollars, and

which they apprehend may be removed. They pray that said slave be sequestered, and that Slaughter & Badger be made parties to this suit. EASTERN DIST.
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The affidavit sets forth, that the plaintiff, Clark, *fears* the said negro *may be removed beyond the jurisdiction of the state*, unless prevented by a writ of sequestration.

The defendants, Slaughter & Badger, excepted, and prayed that the sequestration be set aside.

1. Because the facts set forth did not authorize it.
2. They are improperly made parties.
3. The affidavit is only sworn to by the attorney of one of the plaintiffs.
4. The affidavit is insufficient, in not showing the facts which *induced the apprehension* that said slave will be removed.
5. Neither of the plaintiffs state, that said slave would be removed out of the state before they could have the benefit of their mortgage.
6. The affidavit is informal and insufficient in several particulars.

They then pleaded various matters to the merits of the plaintiff's demand.

The parish judge presiding, sustained the exceptions, and set aside the sequestration, and the plaintiffs appealed.

Lawson, for the appellants.

Muse, contra.

Morphy, J., delivered the opinion of the court.

Plaintiffs appeal from a judgment dissolving an order of sequestration, granted at their instance. The property sequestered was a slave, whom they allege to have been specially mortgaged to them by one James C. Shule, and to have been sold by the latter, to Slaughter & Badger, in whose possession he now is. The alleged ground for obtaining this order, was their apprehension that the slave would be removed out of the state. Various grounds are assigned in the judgment appealed from, for the setting aside of the

CLARK
VS.
GLOVER ET AL.

EASTERN DIST.
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JOHNS
vs.
BOYLE.

An affidavit, in which the plaintiff states that "he fears the defendant is on the eve of running the mortgaged slave out of the jurisdiction of the state, is insufficient to obtain an order of sequestration. He should state the facts which induce his apprehension.

sequestration.* It will be unnecessary for us to notice them all, because we concur in the opinion expressed by the judge below, as to one of them, to wit: the insufficiency of the affidavit. The plaintiffs make oath, *that they fear that the slave mortgaged may be removed beyond the jurisdiction of the state.* They set forth neither in their affidavit nor in their petition, which is referred to in the affidavit, the facts which induce their apprehension. This is absolutely required by article 275 of the Code of Practice. The mere expression of a fear, which a party may or may not really entertain, cannot, and ought not, entitle him to this extraordinary remedy, especially when, as in the present case, it affects the rights of third persons.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

JOHNS & CO. vs. BOYLE.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF WEST FELICIANA, JUDGE MORGAN PRESIDING.

Three *judicial* days must elapse between taking judgment by default, and the day on which it is made final, or it will be reversed on an assignment of error.

This suit is instituted on a draft, drawn by the defendant, and small account, for the aggregate sum of four hundred and ninety-one dollars.

The defendant failed to appear. Judgment by default was taken the 7th December, 1838, and made final on the 11th; the 9th being Sunday. On the 5th January, 1839, a motion was made to set aside the final judgment, as

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having been prematurely rendered. The motion was over-ruled, under the provisions of the *Code of Practice*, article 318. The defendant appealed. EASTERN DIST.
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VS.
BOYLE.

Andrews, for the appellant, assigned for error, that the judgment was improperly rendered, before the lapse of three judicial days, after taking judgment by default. 3 *Louisiana Reports*, 115.

Patterson, contra.

Morphy, J., delivered the opinion of the court.

The appellant assigns as an error apparent on the face of the record, that three judicial days did not elapse in this case, between the rendition of the judgment by default, and that of the final judgment. Although the word *judicial* be omitted in article 312 of the Code of Practice, which allows three days to the defendant to file his answer, we think that it contemplates those days when the court sits. Before filing such answer, the judgment by default must be set aside, which can only be done by a motion in open court. Such has been the construction this article has heretofore received, and no good cause has been shown why it should not be adhered to.

Three judicial days must elapse between taking judgment by default, and that on which it is made final, or it will be reversed on assignment of error.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that this cause be remanded for further proceedings below ; the costs of this appeal to be paid by the appellees.

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CLARK VS. CLARK ET AL.

CLARK
VS.
CLARK ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

It is not a valid objection to testimony, that two witnesses were examined together, and made oath to the same facts, in the same deposition. There is no law prohibiting a joint examination of witnesses, and taking their joint testimony in one deposition.

This is an action instituted by the owner of the steamer Semaphore, claiming damages to the amount of three thousand nine hundred and ninety-two dollars, from the defendants, as owners of the steam tow-boat Hudson, for running into his boat on the night of the 12th December, 1838, through negligence and mismanagement, and causing the injury, for which he seeks redress.

The defendants pleaded a general denial, and averred that the collision and injury complained of was occasioned by the fault, negligence, and want of skill on the part of the officers of the Semaphore; and that the tow-boat officers used all possible care and skill to avoid the collision, and are not liable for any mismanagement or damage.

On these pleadings and issue, the cause was submitted to a jury, on the testimony produced.

A bill of exceptions was taken to the reading of the deposition of two witnesses, Messrs. Heath and Hebert, who were examined jointly by the magistrate, testified jointly to the same facts, and signed and made oath to the same deposition jointly. The objections were, that their testimony should have been taken separately, and apart from each other, instead of jointly, in the same deposition.

On the evidence, the jury returned a verdict of three thousand eight hundred dollars for the plaintiff. From judgment confirming the verdict, the defendants appealed.

Carter, for the plaintiff.

Roselius, contra.

Morphy, J., delivered the opinion of the court.

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January, 1840.

CLARK
VS.
CLARK ET AL.

This suit is to recover damages from the defendants, as owners of the tow-boat Hudson, on the ground that, owing to the gross neglect, carelessness, and want of skill in the management of the officers on board of said boat, she came in collision with, and run foul of the steamer Semaphore, owned by plaintiff. Defendants aver that the collision took place through the fault and mismanagement of the persons having the command of the Semaphore, and that no blame can be imputed to their agents. The cause was submitted to an intelligent jury, who brought in a verdict for the plaintiff. After an unsuccessful effort to obtain a new trial, defendants appealed.

We find, in the record submitted to us without argument, a bill of exceptions, which presents the only point in the cause. A commission, offered in evidence by plaintiff, was objected to, on the ground that two witnesses had been sworn and examined together, by the magistrate, who executed the commission, instead of being sworn and examined separately and apart. It would, certainly, have been more regular and consonant with established practice to have examined the witnesses in the latter way; but we are aware of no law prohibiting a joint examination, when it can be done conveniently and without confusion, as in the present case, where only two witnesses were to answer a few questions touching the same occurrence, which they had both witnessed. At all events, this irregularity, if it be one of any moment, has worked no injury to the defendants, because the material facts stated in that examination have been testified to by other witnesses, whose testimony stands uncontradicted and unobjected to.

It is not a valid objection to testimony, that two witnesses were examined together, and made oath to the same facts, in the same deposition. There is no law prohibiting a joint examination of witnesses, and taking their joint testimony in one deposition.

On the merits, the small portion of the evidence reduced to writing, although fourteen witnesses appear to have been sworn, inclines us to adopt the view which the jury has taken of this controversy.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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PIPKIN vs. THOMPSON.

PIPKIN
vs.
THOMPSON.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

A sale to effect a partition is null, if the formalities required by law are not complied with.

The plaintiff is the daughter of Thomas B. Pipkin, deceased, who died intestate, in December, 1819, leaving a tract of four arpents of land on the Mississippi, as part of the community of acquets and gains. The survivors are the widow, and a son and daughter. In January, 1821, the widow petitioned the Probate Court to convoke a family meeting to deliberate on the propriety of liquidating and partitioning the succession of the deceased.

A family meeting was called, consisting of the tutrix and friends of the minors, without the presence of the under tutor, and advised the sale of the community property, and fixed the terms. The tract of land in question was adjudicated to the surviving widow, without appraisement, at five hundred dollars; being less, by one half, than the price of estimation in the inventory. She sold to the defendant, Thompson.

The plaintiff claims one-fourth in her own right, and three-fourths in right of her deceased brother; alleging that the probate sale to her mother was null.

The defendant set up title and cited in the widow Pipkin as his warrantor. She appeared and claimed title under the probate sale.

There was judgment for the plaintiff against the defendant for one arpent, and in his favor over against his warrantor for the value of the eviction. The defendant alone appealed.

Edwards, for the plaintiff.

Labauve, contra.

Martin, J., delivered the opinion of the court.

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This is a petitory action in which the plaintiff had judgment against the defendant, and he against his warrantors. He appealed and cited the plaintiff alone. The warrantors have followed the defendant to this court, and pray for the reversal of the judgment.

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The record shows that the plaintiff's father left, at his death, a tract of land, four arpents in front, which he had acquired during marriage with his surviving wife. The defendant claimed title under a sale from the widow, to whom it was adjudicated at the probate sale of the succession of the deceased; so that the question turns on the legality or validity of this sale. It was provoked by her petition to the judge of probates, stating the necessity of a partition and liquidation of the succession, and concluding with a prayer that a family meeting be convoked, to fix the terms and conditions of the sale of the property. The meeting recommended the sale and fixed the terms.

It appears to us that the verdict and judgment in this case are correct. The sale was evidently made for a partition, for it is not shown that it was required for the payment of the debts of the succession. None of the formalities required in an action of partition by licitation were complied with. There was no inventory and appraisement made within the year. *Louisiana Code*, 1248. It was neither alleged or shown that the property was indivisible by its nature, or could not be conveniently divided. The defendant did not, therefore, acquire that portion of the premises which descended to the plaintiff at the death of her father, to wit: one arpent. The widow and the plaintiff's brother were entitled to the remaining three arpents.

The defendant has relied on the plea of prescription, but the plaintiff has shown that she was not of age at the inception of the suit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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LE BLANC vs. DASHIELL.

January, 1840.

LE BLANC

vs.

DASHIELL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

A party having a separate and independent right of action is under no obligation, and cannot be required to intervene or cumulate his suit with others, litigating about the same matter.

The law not only requires a statement of the facts, showing an injunction to be necessary, before it is granted, but they must be positively sworn to, so as to subject the party to the penalties of perjury, if not true.

An affidavit is not vitiated, by setting forth superfluous matters, if it be otherwise good.

Where the appellee asks to have the judgment amended, he cannot have damages for a frivolous appeal.

This suit commenced by the hypothecary action. The widow Le Blanc caused to be sold, in 1830, in the parish of Iberville, the community property existing between her and her late husband, at probate sale, when Timoleon Lesassier became the purchaser of a tract of land, with two arpents front, &c.; paying part of the price, and giving a mortgage to secure the payment of the balance. In March, 1836, Lesassier sold to Addison Dashiell, the present defendant, who assumed the payment of the debt still due, with mortgage granted thereon.

In March, 1837, there remained due on this land the sum of eighteen hundred dollars, and the plaintiff commenced her hypothecary action against the third party in possession.

Dashiell obtained an injunction. The facts upon which he relied are fully stated in the opinion of this court.

On the trial, the district judge being of opinion that the defendant had shown no sufficient ground to sustain the injunction, dissolved it with ten per cent. interest and five per cent. damages and costs, and the defendant appealed.

Ives, for the appellant.

Labauve, contra.

Morphy, J., delivered the opinion of the court.

The plaintiff, in her own right, and as natural tutrix of her minor children, proceeded, by the hypothecary action,

against defendant, as third possessor of some property mortgaged to her by T. Lesassier, his vendor. Defendant enjoined her proceedings on the following grounds, to wit:

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1. That T. Lesassier, his vendor, had already obtained a judgment against him for the same debt; that by intervening in Lesassier's suit against him, as she was advised to do by Lesassier's counsel, she could have had the benefit of said judgment, without subjecting defendant to the hardship, trouble and costs of two distinct suits, and the danger of paying twice the same debt.

2. That, in defendant's opinion, plaintiff was not legally qualified as tutrix of her minor children, to institute those proceedings.

3. That, as third possessor, he has not had the notice required by law, of the demand made on the principal debtor, Lesassier.

4. That the petition and affidavit, on which the order of seizure and sale issued, are insufficient, inasmuch as they do not set forth that ten days notice had been given to defendant, previous to the inception of these proceedings, of the demand made on Lesassier, thirty days before.

I. Plaintiff having a separate and independent right of action, was under no obligation whatever of thrusting himself in the midst of the heated and protracted litigation then and still going on between defendant and Lesassier; to have done so, when her remedy was a plain, simple and prompt one, would have been, to say the least of it, a very injudicious act; having then pursued her own rights, in her own way, she has occasioned no hardship to defendant, who could have saved the additional trouble and costs he complains of, by satisfying plaintiff's just claim on the property in his possession. As to the fear of paying twice the same debt, if seriously entertained, the defendant has thus far avoided that danger by not paying at all.

A party having a separate and independent right of action, is under no obligation, and cannot be required to intervene or cumulate his suit with others litigating about the same matter.

II. An injunction would be indeed a very safe and convenient proceeding for the use of debtors, if it could be obtained on the mere expression of their opinions, as to the rights of their creditor. The law not only requires the statement of

The law not only requires a statement of facts, showing an injunction to be necessary be-

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fore it is granted, but they must be positively sworn to, so as to subject the party to the penalties of perjury, if not true.

An affidavit is not vitiated by setting forth superfluous matters, if it be otherwise good.

Where the appellee asks to have the judgment amended, he cannot have damages as for a frivolous appeal.

facts showing that remedy to be necessary, but also such an affidavit as will submit the party to the penalties of perjury, if the facts sworn to appear to be otherwise; and it must be confessed, that it would be a difficult matter to prove defendant's opinion to have been different from that expressed and sworn to by him, in his petition for an injunction.

III. The evidence shows that plaintiff, in injunction, received more than ten days notice of the demand made on the principal debtor, before any proceedings were had against him.

IV. The affidavit of plaintiff is drawn up in strict accordance with article 70, of the Code of Practice; if it varies from it, it is only in setting forth superfluous matters.

The court below very properly dissolved the injunction, but awarded only five per cent. damages. The appellee prays that the judgment be so amended as to allow twenty per cent. damages, instead of five, and one hundred and fifteen dollars for special damages. He moreover prays for ten per cent. damages, as on a frivolous appeal, independent of ten per cent. interest on the debt. The appellee cannot expect us to grant all that she asks. It would be indemnifying her beyond all measure of any loss or inconvenience she may have sustained, and turning into a piece of good fortune for her, the remedy resorted to by the defendant.

At all events, as she has availed herself of this appeal to have the judgment below amended, she cannot obtain damages from the appellant, who has afforded her the opportunity of gaining by the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, as to the dissolution of the injunction; and that, in addition to the ten per cent. interest and five per cent. damages on the amount of the debt, there be judgment for five per cent. more damages, and for one hundred and fifteen dollars, amount of special damages proved on the trial.

MORGAN VS. WHITESIDES' CURATOR.

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January, 1840.APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINTE COUPEE, THE JUDGE OF THE SECOND PRESIDING.MORGAN
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CURATOR.

Two demands, clearly inconsistent and exclusive of each other, cannot be cumulated in the same action; but the plaintiff may make his election, which he will proceed with, at the trial.

An order for the discontinuance of a suit may be used as evidence of this fact, as soon as it is entered on the minutes. It does not require the signature of the judge.

It is not enough to obtain an injunction staying executory proceedings, to show an abstract irregularity. Injury to the applicant, or some apprehension of it, can alone justify a resort to this remedy.

So, an injunction should not be granted to stay an order of seizure and sale, when it is clear the party has a right to make another seizure, by taking out an *alias* order.

This suit commenced by injunction. The plaintiff alleges he purchased a tract of land at the probate sale of Philip Whitesides' succession, in the parish of Pointe Coupée, in November, 1836. That since then, David Whitesides, curator, and one of the heirs of P. Whitesides, obtained an order of seizure and sale, against this land, for the payment of the sum of four thousand and sixty dollars, with interest, which was seized by the sheriff on the 30th June, and advertised on the 3d of August, 1838, allowing only three days, when the defendant, in the seizure, resides more than forty miles from the judge who granted the order.

That said David Whitesides, as curator, heir, agent of the other heir, and one S. A. Lard, have also commenced suit against him for the same land, claiming to be owners under another title. He alleges various other informalities in the executory proceedings, and prays for an injunction to restrain and stop the sale, &c. The defendants pleaded a general denial, and averred that the injunction was wrongfully sued out, and ought to be dissolved with damages.

Upon these pleadings and issues, the cause was tried.

On the trial, the defendant offered an extract from the minutes of the court, to show that he had discontinued his

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CURATOR.

suit for the land, which was received, and the trial ordered to proceed in relation to the order of seizure. The plaintiff's counsel objected, and excepted to the order of continuance as evidence, on the ground that it was not signed by the judge.

On the evidence and documents produced, the court dissolved the injunction without damages, and the plaintiff has appealed.

Stevens, for the plaintiff.

I. The court below erred in receiving in evidence a judgment of non-suit or discontinuance, taken in this case, in relation to the defendant's claim to the land :

1. Because it was taken at the same term of the court in which it was offered in evidence. *Code of Practice, article 555.*

2. Because it had not been signed by the judge.

II. No notice was given to Morgan of the existence of the order of seizure and sale, nor of the writ of seizure and sale, before the sheriff seized the land, after which said Morgan was notified that, unless he paid the mortgage debt and costs, within three days, the land would be advertised and sold, though the said Morgan resided at the distance of about forty miles from the residence of the judge who granted the order. Hence said Morgan was entitled to five full days notice before the said seizure could be legally made. *Code of Practice, article 735. 7 Martin, N. S., 512, 513.*

Patterson, contra.

Morphy, J., delivered the opinion of the court.

The appellant complains of the dissolution of an injunction sued out to arrest the execution of an order of seizure and sale, taken by defendant, as curator of the estate of Philip Whitesides.

The main grounds assigned below were :

1. That at the time the order of seizure and sale issued against the property, which plaintiff had bought of the estate of P. Whitesides, there was a suit pending in which the land

was claimed of him; that said suit had been brought by defendant, as curator, and in his own name and that of his brother, both sole heirs of Philip Whitesides, together with one S. A. Lard, on the ground that the sale made to plaintiff was void, because he had not paid the purchase money; and also on the ground that the land claimed did not belong to Philip Whitesides, at the sale of whose succession plaintiff had purchased, but on the contrary belonged to the estate of one Peter Barbary, deceased, under whom they claimed.

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2. That the sheriff seized the land without giving plaintiff any previous notice, and that the notice given after seizure was only of three days, when he was entitled to five full days, because he lived at a distance of more than forty miles from the residence of the judge who granted the order.

1. On the argument of this cause, we were forcibly struck with the singular, anomalous and unaccountable part acted, throughout these proceedings, by the defendant in injunction. We find him praying for the rescission of the sale of property conveyed to plaintiff by himself, as curator of the estate of Philip Whitesides, and at the same time joining a stranger, and claiming jointly with him the same property as belonging to the estate of one Peter Barbary, under whom they claim, and not to the succession of P. Whitesides, of whom defendant states himself and his brother to be sole heirs. After all this, he proceeds to enforce the payment of the price by taking out an order of seizure and sale against the same property, as curator of P. Whitesides. No effort having been made by defendant's counsel to explain this course of conduct, we shall certainly make none to understand it, and shall pass it without further comment.

The suit for the land, and that on the proceedings enjoined, came up for trial on the same day. The demands in these two suits were clearly inconsistent and exclusive of each other. Although article 149, of the Code of Practice, speaks only of a cumulation of inconsistent demands in the same action, we see no good reason why the faculty therein given to a plaintiff to decide which demand he wishes to proceed with, should not extend to inconsistent demands in

Two demands, clearly inconsistent and exclusive of each other, cannot be cumulated in the same action; but the plaintiff may make his election which he will proceed with, at the trial.

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An order for the discontinuance of a suit may be used as evidence of this fact as soon as it is entered on the minutes. It does not require the signature of the judge.

It is not enough to obtain an injunction staying executory proceedings, to show an abstract irregularity. Injury to the applicant, or some apprehension of it, can alone justify a resort to this remedy.

So, an injunction should not be granted to stay an order of seizure and sale, when it is clear the party has a right to make another seizure, by taking out an *alias* order.

two distinct actions. The election then was here made by entering a discontinuance in the action for the land. On the trial of the injunction case, the defendant offered an extract from the minutes of the court, showing such discontinuance. This was objected to by plaintiff, on the sole ground that it was a judgment not signed, and could have no effect before the last day of the term, according to article 555, of the Code of Practice. The court below admitted the evidence, and, in so doing, we think, did not err. The action of a court, on a motion to discontinue, cannot be viewed in the light of a judgment. It decides nothing between the parties, and the entry, when once made on the minutes of the court, has all the effect which it can ever have or acquire at any posterior time. The extract offered was, then, the best evidence of the fact of discontinuance. We can imagine none of equal dignity.

II. As to the second ground, the notice was irregular; it should have preceded the seizure; but it is not enough to obtain an injunction to show an abstract irregularity. Injury to the applicant, or at least some apprehension of it, can alone justify a resort to this extraordinary remedy. Why should we perpetuate an injunction staying an order of seizure and sale, when it is clear the party enjoined has a right to proceed to another seizure and sale, by taking out an *alias* order. From the turn the proceedings have taken, plaintiff has had now abundant notice of the seizure to be executed against him, and no possible injury can result to him from suffering the party to proceed with his writ according to law. It appears, however, to us, that the court below was wrong in decreeing costs against plaintiff, because, at the time he sued out this injunction to stay defendant's proceedings, he was justified in that course by the suit for the land then pending against him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, as to the dissolution of the injunction, but be so amended that the costs of both courts be paid by the defendant and appellee.

SMITH VS. BRADFORD ET AL.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST FELICIANA, JUDGE MORGAN PRESIDING.

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When the sheriff acts honestly, being a public officer, he must be protected against excessive and vindictive damages.

So, where the sheriff illegally removed slaves by seizure from the plantation they were cultivating, a bare remuneration for the loss sustained, so far as it can be ascertained, should be adopted as the measure of damages.

The damages for loss of time of slaves, by illegal seizure and removal, should be estimated at the usual rate of hiring slaves.

This suit commenced by injunction. The plaintiff alleges, his vendor, Charles M. Smith, purchased a plantation and eleven slaves from the defendant, M. Bradford, for seventeen thousand seven hundred and eighty dollars, on which he paid five thousand dollars in cash, and for the balance gave his notes, payable by instalments, with mortgage to secure payment.

He further shows, that Charles M. Smith has since sold and conveyed to him the plantation and slaves, and that he has been in the possession and enjoyment thereof, and whilst he was cultivating his crop in the month of May, 1838, Bradford, the original vendor, illegally took out an order of seizure and sale against the mortgaged property, without making the necessary legal demand on the original debtor, thirty days before coming on him, and not having pursued other formalities required by law; and the sheriff removed the slaves from the plantation, in violation of law, and the article 660, of the Code of Practice. Wherefore he prays for an injunction, staying the order of seizure and sale; and that the sheriff, Thomas J. Robbins, and M. Bradford, be enjoined from further proceedings under the order of seizure and sale, and condemned to pay damages for the illegal seizure and removal of his slaves, &c.

The defendants answered separately. Bradford pleaded a general denial, and justified the course pursued; and

EASTERN DIST. averred, that he had been injured by the wrongful suing out
January, 1840. of the injunction, which, he prayed, might be dissolved, with
 damages.

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The sheriff, Robbins, denied, generally, any liability, and justified under the writ of seizure, in virtue of which he acted; and averred, that he removed the slaves, because he apprehended, if he left them, they would be taken from the plantation, and put out of his reach.

Upon these pleadings and issues the cause was tried.

The district judge, upon the evidence adduced, came to the following conclusion and judgment:

Having decided that the order of seizure and sale improvidently issued, the only questions remaining are, is the plaintiff entitled to any damages, and if so, to what amount? On the part of the sheriff it is contended, that he is not responsible, because he only acted as the agent of his co-defendant, and that he has not been put in delay. The first ground is not tenable. The sheriff, it may be true, is not responsible while acting within the sphere of his duty, but the moment he goes beyond that, and violates the law, or commits a trespass, he becomes individually liable for all the injury a party may sustain from his illegal acts. The general rule is, that when he levies upon personal property or slaves, he should put them in a place of safety, under the penalty of being responsible for the loss or injury, which they may sustain through his fault or neglect. *Code of Practice*, 659: but the next article of the code makes an exception to this rule. Nevertheless, (says the art. 660) the sheriff cannot remove from the lands or plantations, the implements of agriculture, the cattle or slaves employed in cultivating or clearing them, but he may appoint a guardian or owner for their preservation. He may, also, make such disbursements as are necessary for their preservation. *Code of Practice*, 661.

The second ground is equally untenable. It is believed that there is no provision of the laws of this state, which requires that a party should be put in *mora*, before an action can be instituted against him for committing a trespass. But while the court are of opinion that he is responsible to

the plaintiff, in damages for his illegal act, there is nothing in the circumstances of this case which would render it proper to render a judgment for vindictive damages. As against him, the court cannot take into consideration the expense to which the plaintiff has been put, by being obliged to institute this suit. That expense will properly fall upon the defendant, Bradford.

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Indeed, it would appear that the whole claim for damages might, with propriety, have been stricken from the petition; but the parties have thought proper to put them at issue, and the court is bound to pass upon the issue so joined. The testimony as to the damage resulting from the illegal removal of the slaves, and their detention, is, as might have been expected, somewhat variant. The court has adopted the estimate of De Lee and Nettles, and estimates the amount to be recovered from the defendant, Robbins, at five hundred and twenty-eight dollars.

The court has been urged upon the authority of the case of the Ursuline Nuns *vs.* Depassau, 7 Martin, N. S. 645, if it should come to the conclusion that the proceedings were defective, not to render a final judgment in the case, but only to set aside the seizure and permit the party plaintiff in suit to proceed therein according to law. Upon reference to that case, it will be perceived that it must have been conducted according to a mode of practice established by the rules of the court of the first district, and without regard to any rules as laid down in the Code of Practice. Where the courts are continually in session, it doubtless affords great facilities to parties to be enabled to correct irregularities by motion, and thus, among other advantages, obviate the necessity of giving bond and security to enable the party complaining to obtain an injunction. But no such rule has ever been adopted by this court, nor could it be, for the plain reason that the chances are as ten to two against the court being in session to enable the party to have his motion determined, and the motion could not suspend the proceeding under the seizure, unless predicated on some of the grounds set forth in article 739, Code of Practice, and, perhaps, not

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even then, unless an injunction had been granted. It certainly would be a novelty in judicial proceedings to try a cause on its merits, pronounce a final judgment in favor of a defendant, and in the same decree allow the plaintiff to amend his pleading, and again put the defendant on his defence. Neither can the court lend its aid to the party to convert his proceedings *via executiva* into the *via ordinaria*. The party who obtained this injunction is a third possessor, and no other judgment could be rendered against him, but one dissolving the injunction with such damages as the justice of the case might require.

It is, therefore, ordered, adjudged and decreed, that the injunction granted in this case be rendered perpetual; and it is further ordered, adjudged and decreed, that the plaintiff recover of the defendant, Thomas J. Robbins, the sum of five hundred and twenty-eight dollars, and of M. Bradford five hundred dollars.

The defendants appealed.

Andrews, for the plaintiff.

Lawson, for the defendant.

Bullard, J., delivered the opinion of the court.

The only question arising in this case, which has been argued in this court, and upon which we are called to pronounce, relates to the quantum of damages which the plaintiff is entitled to recover against the sheriff, for removing certain slaves from the plantation which they were engaged in cultivating, in violation of article 660, of the Code of Practice. It appears that eleven slaves were removed from the plantation during ten days, early in the month of May.

When the sheriff acts honestly, being a public officer, he must be protected against excessive and vindictive damages.

It is not pretended but that the sheriff acted honestly. Being a public officer, in the discharge of his duty, he is to be protected against excessive and vindictive damages. The judge of the district adopted a standard, by which damages in the case should be measured, which is not satisfactory to this court. We think the plaintiff entitled to nothing more

than a bare remuneration for the loss sustained, so far as it can be ascertained. The judge assumed, as the basis of his calculation, the theory of two of the witnesses, to wit: that the eleven hands would have made forty-four bales of cotton, and that the loss of time is equal to one fourth, say eleven bales, of four hundred pounds each, estimated at from twelve to thirteen cents per pound. This appears to us too complex for practical application in such cases as the one now before the court. It assumes, that every slave will make four bales of cotton, makes no allowances for sickness, loss of time in consequence of bad weather, and the expense of clothing; and, in fact, considers the gross amount of sales of the crop as the net profit of the labor of the slaves, without considering the other expenses of cultivation. Nor did the court make any allowance for one Sunday, which must have intervened. Although the scraping season may be important, we are not satisfied that a delay of ten days, early in the month of May, necessarily involves a loss of one-fourth of the crop of the whole year. We consider the sheriff bound to make good the loss of time at the usual rates of hiring slaves. And from the best consideration we have been able to give the subject, little aided, indeed, by the testimony in the record, we conclude that the plaintiff is entitled to recover one hundred dollars damages.

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So, where the sheriff illegally removed slaves, by seizure, from the plantation they were cultivating, a bare remuneration for the loss sustained, so far as it can be ascertained, should be adopted as the measure of damages.

The damages for loss of time of slaves, by illegal seizure and removal, should be estimated at the usual rate of hiring slaves.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment as in our opinion should have been given below, it is further ordered and decreed, that the injunction be rendered perpetual; that the plaintiff recover of the defendant, Thomas J. Robbins, one hundred dollars, and of the defendant, Bradford, five hundred dollars, with costs in the District Court, and that the plaintiff and appellee pay the costs of the appeal.

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MORGAN
vs.
LARD ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINTE COUPEE, THE JUDGE OF THE SECOND PRESIDING.

The jury are the peculiar judges of the *quantum* of damages.

Damages may be assessed at an annual sum; and where the petition shows no period from which they shall be computed, and the verdict affixes none, the court may give them from judicial demand, and until the surrender of the premises to the successful claimant.

The plaintiff sued for the recovery and possession of a tract of land, with damages for the illegal detention thereof, and for waste committed. On the trial, the jury returned the following verdict: "Verdict in favor of the plaintiff, that he recover the possession of the land, with four hundred dollars per annum, and costs."

A new trial was insisted on, because the verdict is illegal and void, for uncertainty, and that no judgment can be rendered on it.

The court overruled the motion for a new trial, and gave judgment for the land described in the petition, and for four hundred dollars per annum, in damages, from judicial demand, until possession is restored, with costs. The plaintiff appealed.

Stevens, for the plaintiff and appellant, insisted that the verdict was for too small a sum, and altogether illegal as regards the damages. The judgment should be reversed and the cause remanded for a new trial, &c.

Patterson, contra.

Martin, J., delivered the opinion of the court.

The plaintiff claims possession of a tract of land, with damages for the unlawful detention and waste. The defendants pleaded the general issue.

The plaintiff had a verdict for the possession of the land, and damages at the rate of four hundred dollars per annum.

The court rendered judgment accordingly, and decreed, that the annual damages should begin at the inception of the suit. The plaintiff appealed. EASTERN DIST.
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It appears that the appellant made an unsuccessful attempt to obtain a new trial, on the ground that the verdict was contrary to law and the evidence, and void for uncertainty.

This motion was, in our opinion, correctly overruled. The first objection can have no other reference than to the quantum of damages, of which the jury were the peculiar judges. The jury are
the peculiar
judges of the
quantum of da-
mages.

In this court the appellant's counsel has urged, that the jury ought to have assessed the damages in a gross sum, and not in an annual amount. He has, therefore, prayed that judgment be affirmed, as far as it relates to the possession of the land, and that the cause be remanded for a new trial, as it respects the damages; and if that cannot be done, that the entire verdict be set aside, the judgment reversed, and the case remanded for a trial *de novo*.

The plaintiff has not shown, in his petition, any period from which the damages should be computed; the judge, therefore, correctly gave them from judicial demand. This judgment does not, however, fix the time when these damages are to cease. We think they ought to do so with the surrender of the premises to the plaintiff. Damages may
be assessed at an
annual sum; and
where the peti-
tion shows no
period from
which they shall
be computed,
and the verdict
affixes none, the
court may give
them from judi-
cial demand, and
until the surren-
der of the pre-
mises to the suc-
cessful claimant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion ought to have been rendered in the court below, it is ordered, adjudged and decreed, that the plaintiff recover and be quieted in the possession of the premises, with damages at the rate of four hundred dollars per annum, from the inception of the suit, until possession be given to the plaintiff.

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GAY VS. ARDRY.

GAY
VS.
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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINTE COUFEE, THE JUDGE OF THE SECOND PRESIDING.

The party who fails to offer evidence of the facts, on which his exception is based, and proceeds to trial on the merits, may be held to have waived the exception.

A party has no right to interrogate a juror, on oath, whether he understands the English language.

A verdict which gives interest from *judicial* demand is sufficiently certain, as the record specifies the day.

Judgment may be rendered after the lapse of more than three days from that on which the verdict is found. The appellant complains with a bad grace, that judgment was not rendered against him soon enough.

This is an action against the maker of a promissory note.

There was a verdict for the sum claimed with legal interest from judicial demand. The verdict was found the 24th May, and judgment rendered thereon the 13th June following. The defendant appealed, and assigned the points on which he relied as stated in the opinion of the court.

Stevens, for the appellant.

Patterson, for plaintiff and appellee.

Bullard, J., delivered the opinion of the court.

The appellant relies upon the following points :

1st. That the court erred in ruling that the defendant had waived his exception, by not requiring a trial on it, before the case was set down for trial.

2d. That the court erred in not permitting him to interrogate a juror, on oath, whether he understood the English language.

3d. That the verdict is void, because it does not specify the day from which the interest is to be computed.

4th. That the judgment was not rendered within the three days after the verdict, as required by the Code.

I. The record does not inform us of the facts upon which the exception alluded to was based. The appellant having proceeded to trial on the merits, without offering any evidence of such facts as were necessary to sustain his exception, may well be held to have waived it.

II. The law has not thought proper to make ignorance of the English language a good cause of challenge. The question was, therefore, in our opinion, impertinent.

III. The verdict gives interest from judicial demand, which date is shown by the record, "*id certum est quod certum reddi potest.*"

IV. The appellant complains, with a bad grace, that the judgment was not rendered against him soon enough. We can perceive no good reason why judgment should not be rendered more than three days after verdict found, if there be no other objection.

We should have granted the prayer of the appellee for damages on this appeal as clearly frivolous, if it had not been filed too late. *Code of Practice, article 890.*

It is, therefore, ordered and adjudged, that the judgment of the District Court be affirmed, with costs.

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The party who fails to offer evidence of the facts on which his exception is based, and proceeds to trial on the merits, may be held to have waived the exception.

A party has no right to interrogate a juror, on oath, whether he understands the English language.

A verdict which gives interest from judicial demand is sufficiently certain, as the record specifies the day.

Judgment may be rendered after the lapse of more than three days from that on which the verdict is found. The appellant complains, with a bad grace, that judgment was not rendered against him soon enough.

GILLESPIE VS. DAY.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. HELENA.

Proceedings had *ex parte*, going to homologate a tutor's account and grant a final discharge, when there is no opportunity given to the heir at law to contest the account, are illegal and do not form the exception of *res judicata*, when the tutor is called on to render his account by the heir of the deceased pupil.

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This is an action to compel the defendant to render a complete and perfect account of the tutorship of his late pupil, Wm. Day, deceased. The plaintiff is the mother and heir at law of the deceased, and the defendant his grand-father.

He sets up in defence the plea of *res judicata*, and a former judgment of the Court of Probates, accepting and homologating his final account as tutor, and granting a discharge.

The record shows that, on the 28th November, 1837, the present defendant presented his petition and an account of his tutorship, which he prayed might be accepted and homologated, and he discharged from all further liability in the premises.

The judge of probates made an order granting the prayer of the petitioner, and that *ten days notice* of filing the tableau or account be given, according to law.

On the 11th December following, the judge decrees, "there being no opposition after *ten days legal notice*," that the account and tableau be homologated, and that the petitioner be permitted to expend the funds on hand in the payment of the privileged debts, &c., and that he be discharged from all further liability, &c.

The record of this judgment was produced in evidence, and there was judgment sustaining the exception of *res judicata*, from which the plaintiff appealed.

Andrews and Davidson, for the appellant.

Penn, contra.

Bullard, J., delivered the opinion of the court.

This is an action against a tutor to compel a rendition of his account of tutorship. The defendant admits that he was the tutor of the minor, William Day, since deceased, but among other things, pleads the exception of *res judicata*. The record shows, that, after the death of the pupil, the defendant, his tutor and grand-father, presented a petition to the Court of Probates, in which he represented that William

Day, his grand-son and late pupil, had departed this life, leaving himself and Mrs. Nancy Gillespie, his mother, as his heirs at law; that, by the death of said minor, his trust as tutor, of course, expired, and he begs leave to submit a statement in the form of an account current of his actings and doings in that capacity. He signifies his acceptance of the succession of his grand-son, and as the estate consists of notes, accounts, &c., he has fixed, in his tableau, the amount coming to each party. He prays that legal notice may be given, and after due proceedings had in the premises, that the tableau and account may be homologated, and the payments made accordingly, and the petitioner may be discharged from all further liability in the premises. No citation to any person was issued, but after some days notice, the Court of Probates decreed, that this account and tableau of distribution, as it is styled, be acknowledged and allowed; that the petitioner be permitted to expend the funds on hand in the payment of the privileged claims, and that the petitioner, William Day, be discharged from all further liability as tutor of said minor.

We think the Court of Probates erred in sustaining this exception. The proceedings, by which the pretended discharge was obtained, were wholly *ex parte*, and we know of no law by which they were authorized. No opportunity was given to the heir at law to contest the account thus rendered, and the Court of Probates is without authority to finally pronounce upon the rights of parties not before it.

It is, therefore, ordered and adjudged, that the judgment of the Court of Probates be reversed, the exception overruled, and the case remanded for further proceedings according to law, the appellee paying the costs of the appeal.

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Proceedings had *ex parte*, going to homologate a tutor's account, and grant a final discharge, when there is no opportunity given to the heir at law to contest the account, are illegal, and do not form the exception of *res judicata*, when the tutor is called on to render his account by the heir of the deceased pupil.

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RATLIFF VS. HIS CREDITORS.

RATLIFF
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APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF
EAST FELICIANA, JUDGE JONES, OF THE EIGHTH DISTRICT, PRESIDING.

It must appear from evidence before this court, that the appellee resides out of the state, at the time of service of citation made on his attorney, or it will be insufficient.

The appeal having been once granted, the judge *a quo* has no longer any control, and cannot make any order respecting a citation or the mode of serving it.

An appeal is not to be dismissed, according to the provisions of the act of March 20, 1839, if the irregularity of the citation, or service thereof, is not imputable to the fault of the appellant: otherwise, if it is.

In this case there was judgment overruling the opposition of the representatives of N. Cox, deceased, to the tableau of distribution filed by the syndic, in which a preference was set up over the claims of Rhodes & Peters, Palmer & Southmayd, and other creditors. The opponents appealed, and made these two firms and the syndic, appellees.

Citations and petition of appeal were regularly served on Palmer & Southmayd, and on the syndic. But in relation to Rhodes & Peters, the sheriff of New-Orleans, to whom process had been sent, returned, "that they could not be found in his bailiwick."

The counsel for the appellant applied by petition to the judge *a quo*, alleging, the sheriff returned that Rhodes & Peters were not residents of the state, and had no agent therein; and prayed for a new citation of appeal to be served on their attorney at law, which was granted.

Andrews, the attorney, moved to dismiss the appeal, and stated, he was not the attorney of Rhodes & Peters, at the time of service of the citation, and that one member of said firm was dead, and the other resided in New-Orleans.

Muse, syndic of the creditors, &c., also filed grounds for the dismissal of the appeal.

Lobdell, for the appellants.

Martin, J., delivered the opinion of the court.

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The dismissal of the appeal is prayed for on account of irregularity in the service of citation, which was made on the attorney of the appellees, Rhodes & Peters. The sheriff having returned on the first citation, that the appellees were not found in his parish, the appellant obtained the judge's order for an *alias* citation to be served on the attorney, which was accordingly done.

It is urged, that one of these appellees, at the time of the service made on the attorney, resided in the city of New-Orleans, the sheriff of which made the return of "not found," and that the other one was dead.

The Code of Practice, article 582, requires service of citation of appeal to be made on the appellee, "if he resides within the state, or on his advocate if he do not." There is on evidence before us that the appellees resided *out* of the state at the time of the service. They are stated in the proceedings, as residing in the city of New-Orleans. The return of the sheriff, on the first citation, does not state that they had ceased to reside there. It states only that they were not to be found. There was no necessity for a personal service, and the citation might have been left at the place of their usual domicil, which does not appear to have been changed.

The appeal having been granted, the district judge had the case no longer under his control, and could give no order as to the mode of serving the citation.

Under a law passed at the last session of the legislature, approved March 20th, 1839, an appeal is not to be dismissed on account of any irregularity in the citation or service thereof, whenever such irregularity is not to be imputed to the appellant. In this case, it is clearly imputable to the counsel of the appellant, whose act is that of the client.

It does not appear to us that we are authorized to give any relief. The appeal must, therefore, be dismissed, with costs.

It must appear, from evidence before this court, that the appellee resides out of the state, at the time of service of citation made on his attorney, or it will be insufficient.

The appeal having been once granted, the judge *a quo* has no longer any control, and cannot make any order respecting a citation, or the mode of serving it.

An appeal is not to be dismissed according to the provisions of the act of March 20th, 1839, if the irregularity of the citation, or service thereof, is not imputable to the fault of the appellant; otherwise, if it is.

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PIPKIN
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DOIRON.

PIPKIN vs. DOIRON.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

The property of a succession, which descends to, and is inherited by the minor children, cannot be adjudicated to the surviving widow and mother, for *less than its appraised value*.

The plaintiff, Adèle Pipkin, in her own right, and as heir of her deceased brother, claims a tract of four arpents of land with the usual depth, which she alleges was the separate property of her father, at his death, in 1819 ; that her and her late brother, Philip P. Pipkin, were the sole issue of the marriage between her father and Armede Villiers, and inherited all his separate property.

She further shows, that, shortly after the death of her father, there was a probate sale of his estate at which the surviving widow became the purchaser of the tract of land in question, at less than the appraised value ; and that the judgment ordering the sale, and the sale itself, are illegal, null and void. She also alleges and shows, that her brother died in 1833, without descendants, and that she inherits three-fourths of his estate, and her mother one-fourth. She, therefore, prays that the defendant in possession be adjudged to deliver up to her the contested premises, and that her title thereto be declared valid, and that she be quieted in the possession and have judgment for damages and rents, for the illegal detention of the same.

The defendant derived title immediately from the heirs of Laurent Villiers, who purchased from Armede Villiers, (widow Pipkin,) whose title rests on the validity of the probate sale of the estate of Thomas Pipkin, deceased. The defendant called in all his vendors in warranty. Upon the titles and evidence adduced, the judge presiding gave judgment for the plaintiff, decreeing her three and one-tenth arpents of the tract of land, and ordering her to pay seven hundred and seventy-five dollars, the value of the improve-

ments, from which is to be deducted the rents from the time of bringing suit, until the plaintiff is put in possession, at the rate of forty-two dollars per annum; the defendant, Doiron, to have a privilege on the property for his improvements, and to pay costs; and that the defendant recover the sum of eight hundred and fifty-six dollars, and rents which he has to allow and pay, from his warrantors, the heirs of Laurent Villiers, who have a like judgment over against Madame Armede Villiers. The last warrantor appealed.

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Burke and Taylor, for the appellants.

Labauve, for the defendant, Doiron, who, in his answer to the petition of appeal, avers that the judgment is erroneous and should be reversed; that the first sale in question was made by order or in pursuance of a judgment of the Probate Court, of competent jurisdiction, and was sold to pay the debts of the succession, and is valid in law.

Edwards, for the plaintiff and appellee.

Bullard, J., delivered the opinion of the court.

The plaintiff in this case, as heiress of her father and brother, asserts title to a tract of land in possession of the defendant. It is shown that the father of the plaintiff, previously to his marriage with her mother, was owner of the land in controversy; that he died, leaving two children, to wit, the plaintiff and a son, who afterwards died without descendants, and that the plaintiff and her mother inherited from him, the former for three-fourths, and the latter for one. She, therefore, shows title in herself to one-half, and three-fourths of the other half of the tract of land.

The defendant claims through the widow, in virtue of a probate sale; and the sole question is, whether that sale divested the title of the plaintiff and her brother, who were minors at the time. Various nullities are alleged, both in relation to the steps which preceded the judgment of the Court of Probates ordering the sale, and in relation to the

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The property of a succession, which descends to, and is inherited by the minor children, cannot be adjudicated to the surviving widow and mother, for less than its appraised value.

capacity of the widow, who was, at the same time, tutrix of her minor children, to purchase. We think it unnecessary to go beyond the sale, which was clearly null, because the property did not bring its appraised value. The land was estimated at fifteen hundred dollars, and was purchased at five hundred dollars. Admitting that the judgment ordering the sale was correct, or that it cannot now be questioned, yet it is obvious that the judgment did not authorize the sale for a less price than the appraised value. The wrong was committed in executing the judgment, and not in the judgment itself. The doctrine in the case of *Lalanne's Heirs vs. Moreau*, (13 Louisiana Reports, 43,) that the decision of the Court of Probates ordering the sale is to be taken as conclusive, and cannot be impeached collaterally, does not, therefore, apply to the case now before us.

We find no difficulty in concurring with the District Court upon the question of title; but the defendant complains of the judgment rendered in his favor against his warrantor, and contends that he was entitled to recover a larger sum, having proved the property to be worth, at the time of the trial, two thousand dollars. It is true, some of the witnesses state, that the whole of the tract of land, in its improved state, is worth two thousand dollars, but the defendant recovered by the same judgment from the plaintiff the full value of the improvements. The evidence on this subject is not so positive as to authorize us to disturb the judgment rendered below, believing that substantial justice has been done between all the parties.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ALLAIN & TREMOULET vs. TRUXILLO.

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ASSUMPTION, THE JUDGE THEREOF PRESIDING.ALLAIN & TRE-
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When a party expressly calls for the separate answers of each member of a firm, every member thereof is bound to answer when notified of the order of court, and without a commission being sent, even when the party interrogated resides out of the parish.

It devolves on the party desiring the answers to interrogatories to notify the party interrogated, and give time for the answers to be made.

This is a suit by the payees against the maker of a promissory note. The execution of the note was admitted.

The defendant propounded interrogatories to the plaintiffs, who reside in New-Orleans, touching the consideration of the note sued on, and required separate answers from each. Tremoulet, one of the firm, being in the parish of Assumption at the time, answered, and the parties proceeded to trial, without waiting for the answer of Allain.

On the trial, the defendant's counsel excepted to the answer of Tremoulet being read, and insisted, as both had not answered, the answer of one could not be read, and that the interrogatories to both ought to be taken for confessed. The district judge presiding, sustained the exception, and gave judgment for the defendant. The plaintiffs appealed.

Winchester, for the plaintiffs.

Isley and Nicholls, for the defendant.

Morphy, J., delivered the opinion of the court.

This suit is brought on a promissory note, by the payees. They describe themselves as residing and trading in the parish and city of New-Orleans. The defendant, after taking a frivolous exception, and suffering a judgment by default to go against him, filed an answer. He admits his signature, pleads want of consideration, and propounds interrogatories,

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which he prays that plaintiffs may be ordered to answer severally. Tremoulet being at the time in the parish of Assumption, answered *instantly*, expressing his personal knowledge of the whole transaction, and showing the consideration for which the note had been given. To these answers, the defendant excepted, on the ground of insufficiency; the other plaintiff not having answered as required to do. On the same day, the parties proceeded to trial. During its progress, plaintiff's counsel offered to read the answers of Tremoulet, but defendant objected to their being read without those of Allain, and contended that his interrogatories not having been answered according to the order of the court, the facts therein set forth should be taken for confessed. The judge below being of that opinion, gave judgment in favor of defendant.

When a party expressly calls for the separate answers of each member of a firm, every member thereof is bound to answer when notified of the order of court, and without a commission being sent, even when the party interrogated resides out of the parish.

When a party expressly calls for the separate answers of the members of a firm, we think that every member thereof is bound to answer, as was intimated in *Martineau et al. vs. Carr*, 3 *Martin*, 497. Some discussion took place at the bar in relation to the commission directed to be issued by article 352, of the Code of Practice, when the party interrogated resides out of the parish where the court sits; each party to this suit contending, that it was incumbent on the other, to take out and forward such commission. We are of opinion that neither was bound to do it here. An attentive perusal of the article above cited, taken in connection with the preceding one, shows that it contemplates only the case where one party wishes his adversary to answer in open court, and in his presence. This was not asked by the defendant; no commission then was to be sent to New-Orleans, and the party living there, when notified of the order of court, had only to forward his answers to the clerk to have them filed, but this he could not be expected to do on the very morning he was called upon to answer.

The question then more properly is, on whom devolved the duty of praying for a continuance, in order to afford Allain sufficient time to be notified of, and to comply with the order of court, making it his duty to answer? Surely on

him who needed the evidence. It behoves the party who provokes the answers of his adversary, to use them as testimony for himself on the trial, to take the means required by law to obtain them. It has been determined in this tribunal, that a party who propounds interrogatories to be answered in open court, and neglects to have a day fixed, waives his right to have them taken *pro confessis*, if they be not answered. Thus it appears to us that this defendant, by going to trial without taking any legal steps to afford the absent party any possibility of answering his interrogatories, must be considered as having waived them. There remained then, the answers of Tremoulet, by which, we think, the defendant must be concluded. These answers being full and positive, we apprehend that the defendant has not done himself much injury by thus foregoing those of the other partner. If the latter had any knowledge of the business, his answers would only strengthen the evidence against defendant. If he knew nothing about it, his ignorance could not weaken it. The reason why separate answers are required of the members of a firm is, to guard against any attempt to render nugatory the right of interrogation, by having the answers made by that partner, whose information on the subject would be the most limited.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and now, this court proceeding to render such judgment as in their opinion should have been given below, do order, adjudge and decree, that the plaintiffs do recover of the defendant four thousand eight hundred and sixty dollars and eighty-eight cents, together with interest thereon at the rate of ten per cent. per annum, from the 18th of July, 1838, until paid, and that the defendant and appellee pay costs in both courts.

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It devolves on the party desiring the answers to interrogatories to notify the party interrogated, and give time for the answers to be made.

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Where separate answers of the members of a firm are required to interrogatories, each member is bound to answer separately, when notified; but the party needing them must allow time and procure them.

This is an action on a promissory note, in which the defendant had judgment on an exception, and the plaintiffs appealed. The case is, in all respects, similar to the preceding one, and so decided accordingly.

Winchester, for plaintiff.

Ilsey and Nicholls, contra.

Morphy, J., delivered the opinion of the court.

This case, similar in all its features to the one this day decided between the same parties, presents the same point, and must be governed by the same principles and reasoning.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and this court now proceeding to give such judgment as in their opinion should have been rendered below, do order, adjudge and decree, that the plaintiffs do recover of the defendant four thousand eight hundred and sixty dollars and eighty-eight cents, with interest thereon, at the rate of ten per cent. per annum, from the 18th of July, 1838, until paid, and that the defendant and appellee do pay costs in both courts.

KLATHENHOFF *vs.* ARDRY.EASTERN DIST.
*January, 1840.*APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINTE COUPEE, THE JUDGE OF THE SECOND PRESIDING.KLATHENHOFF
vs.
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Where an absent witness has been duly summoned, and the party makes affidavit setting forth his materiality and the material facts expected to be proved by him, and that he expected his attendance on the day fixed for trial, it will be sufficient ground to obtain a continuance.

This is an action for work and labor alleged to be done in pursuance of a written contract, and on account, by plaintiff, for and at the request of the defendant, in which the sum of three hundred and eleven dollars is demanded.

The defendant pleaded several matters by way of exception; admitted the written contract sued on, but denied any indebtedness or liability under it, or on any other account.

On the day fixed for trial, the defendant moved for a continuance on the following grounds, set forth in his affidavit: "That Robert Harvey, a resident of the parish, is a material witness, duly summoned, by whom he expects to prove sundry facts detailed, and also other material and important facts he expects to establish; but that said Harvey left the parish a short time since, with the intention of returning in the course of a few days, and that he has been expecting him daily," &c.

The judge *a quo* refused the continuance, because the affidavit should state that the affiant did not know that the witness intended to depart, or that he could not prevent his departure before the day fixed for trial, according to article 465, of the Code of Practice. The defendant excepted to the opinion of the court.

There was judgment non-suiting the plaintiff on the written contract, but allowing him sixty-one dollars and forty cents on his account, from which the defendant appealed.

Patterson, for the plaintiff.

Stevens, for the appellant.

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Morphy, J., delivered the opinion of the court.

The defendant complains that the judge *a quo* improperly overruled his motion for a continuance ; his affidavit, which is of unusual length, appears to us as full and comprehensive as could be desired. It was found, however, insufficient by the judge, who tried the cause. He thought, that, in addition to his manifold allegations, the affiant should have sworn that his witness had gone away, and that he did not know that he intended to depart, or could not prevent his departure, as required by article 465, of the Code of Practice. We hold this article inapplicable to the present case. It obviously contemplates those cases in which a witness, being brought to the court-house by legal process, and being there in attendance, goes away without the knowledge of the party. It cannot allude to a witness who has not been summoned at all ; who, previous to the day of the trial, has temporarily left his home, and has not yet returned, although daily expected, as in this case. We know no means in the power of a party to prevent his witness from occasionally absenting himself, if such be his pleasure. We think that the affidavit was fully sufficient to entitle defendant to his continuance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed ; that the case be remanded for further proceedings, and that the appellee pay the costs of this appeal.

BARRETT VS. WALKER.

EASTERN DIST.
January, 1840.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.BARRETT
VS.
WALKER.

According to a statute law of Mississippi, all notes made there are subject to every equitable defence against a *bona fide* endorsee, which could be set up against the payee; and when sued on here, the case must be governed by the *lex loci contractus*.

When a vendee has not complied with his agreement, he cannot complain, and set up as a matter of defence to his note, that the vendor has not extinguished a certain mortgage, when this failure was the consequence of his not complying with his stipulation to pay in a certain manner.

This is an action on three promissory notes, signed by the defendant at Natchez, in Mississippi, the 26th January, 1831, for one thousand dollars each, and payable in all the month of November, 1834. These notes were given in part payment of the price of two tracts of land and slaves, in the parish of Lafourche Interior, purchased of the Bowies by R. J. and D. S. Walker, and James C. Wilkins, for the sum of ninety thousand dollars, as evidenced by two notarial acts of the 12th February, 1831, and an act *sous seing privé*, dated at Natchez, the 7th March, 1831. The latter act fixed and specified the modes and times of payment, according to the real meaning and understanding of the parties.

The defendant pleaded a general denial; admitted his signature, and averred, that there was a failure of consideration; said notes only were to be paid under certain conditions which have not been complied with. A long settlement of accounts were set up in the defence which are stated in the opinion of the court.

The district judge, after going into an elaborate settlement of the accounts between the parties, decided that the defendant was liable to pay his notes. That any failure of the conditions was imputable to him, in not paying off the liens and mortgages. Judgment was rendered for the amount of the notes sued on, and the defendant appealed.

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Sterrett, for the plaintiff.

L. Janin and Johnson, for the defendant.

Morphy, J., delivered the opinion of the court.

The defendant and appellant is sued by an endorsee on three promissory notes, drawn by him at Natchez, to the order of one James Bowie, and payable at the State Bank of Mississippi, in all November, 1834.

The notes sued on were given in part payment of the price of land and slaves, sold by James Bowie and others, to defendant, D. S. Walker, and J. C. Wilkins. The sale was made by notarial act, in the parish of Lafourche, on the 12th of February, 1831, and purports to be for cash; but in an act under private signature, executed at Natchez, on the 7th of March following, the parties declare that the purchase money had not been paid, as acknowledged in the sale; that its amount, to wit, ninety-four thousand four hundred and seventy-five dollars, was payable in six annual instalments, the last to fall due in all November, 1836. This instrument describes certain liens and mortgages on the property sold, amounting to thirty-seven thousand nine hundred and seventy-seven dollars and sixty cents, which were to be paid with and out of the price, as the instalments would become due. It provides, among other things, that, should the purchasers have to make any advances on account of the liens and mortgages therein set forth, before the stipulated periods of payment, they are to be allowed ten per cent. per annum on such advances; and that, before the last instalment is paid, all liens and mortgages, of every description, are to be removed, and the title rendered secure, before signing this private act. The purchasers, moreover, agreed to give five notes of one thousand dollars each, out of a sum of seven thousand seven hundred and eighty-one dollars and ninety cents, which it had first been agreed should remain in their hands; said five notes to be subject to the conditions of the final payment, in 1836, as to the removal of all mortgages, and the security of the title. It is on three of these five notes that the present suit is brought.

A statute of the state of Mississippi, is spread on the record as evidence, and shows that the maker of a note, in that state, may set up any equitable defence against a *bona fide* endorser, which he could offer against the payee. The notes in suit being made in Mississippi, must be subject here to all the rules and limitations prescribed by the *lex loci contractus celebrati*. We are, therefore, bound to examine the defence set up by the maker, as if this suit had been brought by the payee himself; but at the same time we cannot but think that plaintiff, being a perfect stranger to all the transactions between these parties, is entitled to strict proof of all the facts connected with, or growing out of them.

Among other means of defence set forth in the answer, but not insisted on at the trial, the defendant contends that, on the 12th of December, 1835, when this suit was brought, there existed, on the property sold to him, mortgages to the amount of thirty-two thousand five hundred and fifty-one dollars and thirty-six cents; that by express stipulation he was not to be required to pay these notes until three mortgages were raised; of this amount of mortgages complained of as unextinguished, only one thousand six hundred and ninety dollars and eighty-seven cents are mortgages described in the *sous seing privé* act; the balance being the amount of four judicial mortgages set forth in the parish judge's certificate annexed to the sale.

From the private act of the 7th of March, 1831, the purchasers appear to have paid, in cash, twenty-five thousand five hundred and seventy-seven dollars, and to have given their notes for twenty-seven thousand nine hundred and seventy-one dollars and fifteen cents, leaving the balance to be paid by the extinguishment of the mortgages therein mentioned, and amounting to a sum about equal to said balance. The record furnishes no proof that any of these notes have been paid; not being negotiable, they are liable to all the equities which the vendees may be entitled to. If any of them have been paid, it was incumbent on defendant to show such payments. A close examination of the voluminous documentary evidence adduced, has not enabled us

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According to a statute law of Mississippi, all notes made there are subject to every equitable defence against a *bona fide* endorsee, which could be set up against the payee; and when sued on here, the case must be governed by the *lex loci contractus*.

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When a vendee has not complied with his agreement, he cannot complain and set up as a matter of defence to his note, that the vendor has not extinguished a certain mortgage, when this failure was the consequence of his not complying with his stipulation to pay in a certain manner.

to find that, at the institution of this suit, the purchasers had paid more than seventeen thousand nine hundred and sixty-six dollars and seventy-seven cents, towards the extinguishment of the mortgages set forth in the private act; that sum being added to the cash payment above mentioned makes an amount of forty-three thousand four hundred and thirty-three dollars and ninety-seven cents, while they should then have paid, under their contract, the sum of seventy-nine thousand four hundred and seventy-five dollars, all the instalments having matured, except that of 1836. The vendees, therefore, at the inception of this suit, stood largely indebted on their contract, even after allowing the ten per cent. interest on such advances as they had made on the two or three first instalments. Having thus failed to comply with their own obligations, the purchasers cannot, with any good grace, complain of a failure on the part of their vendors, when that failure was a consequence of theirs. It had been covenanted that the mortgages described in the *sous seing privé* act were to be paid out of that part of the price for which no notes had been given; the vendees, therefore, had in their hands abundant means to extinguish the remaining one thousand six hundred and ninety dollars and eighty-seven cents of these mortgages, and pay all their outstanding notes, if yet unpaid at that time.

As to the thirty thousand eight hundred and sixty dollars and forty-nine cents, being the amount of the four judicial mortgages, which defendant contends must also be removed before he can be required to pay the notes sued on, we confess that the notarial sale, taken in connection with the private act, does by no means exhibit, in a very clear light, the real understanding and intentions of the parties. From the best consideration we have been able to give them, we have come to the conclusion that these four judgments were not contemplated in the stipulation providing for the removal of all mortgages previous to the final payment.

In the notarial act we find the following clause: "By a certificate of the said parish judge, dated the 11th of this present month, it appears that the premises and slaves pre-

sently sold, are affected with a number of mortgages, which are to be paid with and out of the consideration of the present sale, except the four judicial mortgages in favor of Robert Thompson, Girod & Brothers, the widow and heirs of Ives Le Blanc, and James and Jean Candelle, amounting to thirty thousand eight hundred and sixty dollars and forty-nine cents, the validity of which judicial mortgages the parties do in no wise acknowledge. The said amount of judicial mortgages is not to be retained by the purchasers on the consideration of this sale, they being, as to said judicial mortgages, satisfied with the warranty here above stipulated, holding the vendors responsible, personally, for all the consequences of the said judicial mortgages."

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It is evident to us, that the *sous seing privé* act was intended to carry into effect this clause of the authentic act. It was to regulate the times and modes of payment, and to describe the particular mortgages to be extinguished with and out of the price; besides these, there are many other legal and conventional mortgages mentioned in the parish judge's certificate, for the removal of which it was necessary to provide before the final payment of the purchase money. From the above recited clause in the notarial act, it appears that the parties, not acknowledging the validity of these four judicial mortgages, intended to place them upon a distinct and different footing from the others. But the appellant's counsel insists, that the notarial act must be controlled by the general and posterior stipulation in the *sous seing privé* act providing for the removal of mortgages of every description. Without some more positive evidence of the real intent and understanding of the parties, we cannot give to this stipulation the meaning and effect contended for. We think that it contemplated the other mortgages stated in the judge's certificate, in contradistinction to those described in the private act, as to be paid out of the purchase money; we cannot give it the effect of destroying a positive and special agreement in relation to these mortgages, when nothing in it shows that the parties had changed their views as to their validity; or that the purchasers intended to withdraw their

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original consent to take the property subject to those liens, pay the price, and resort to their personal action against the vendors for any sums they might afterwards have to pay on account of them.

Upon the whole, if there are any doubts as to the true meaning and effect of the *sous seing privé* act, in reference to the notarial act, we think that an innocent and *bona fide* holder should have the benefit of these doubts, whether they proceed from the insufficiency of the evidence adduced, or from any ambiguity in the wording of the instrument; for, in both cases, it rested with the defendant to remove all doubts or uncertainty on the subject.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
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Where bank stock is pledged to secure a debt to the bank, and is afterwards transferred in payment at its full value, although made on the eve of insolvency, it does not prejudice other creditors, and is not fraudulent as to their rights.

The revocatory action to set aside a contract by an insolvent debtor, to a creditor, to secure a just debt, is only applicable to a particular class of cases, in which the only ground of nullity is an *undue preference* given to one of the creditors, and suit must be brought within a year from the date of such contract.

But the revocatory action may be brought within a year, by a single creditor, from the date of his judgment, against his debtor, or by a syndic representing *all the* creditors within a year from his appointment, to set aside *all contracts* of the insolvent debtor, *by which creditors are injured*.

This is a revocatory action. The plaintiff alleges that, on the 6th January, 1838, he obtained judgment against one Samuel Chapman, on his two promissory notes, for the sum of ten thousand eight hundred and seventeen dollars, with legal interest. That on the 13th July, 1838, execution was levied on one thousand shares of bank stock, belonging to said Chapman, in the Atchafalaya Rail Road and Banking Company, which the bank claimed in virtue of a transfer to the company, by Chapman, the 23d of August, 1837.

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The plaintiff further shows, that, at the time of this transfer, he was a creditor of Chapman for the amount of the notes, on which he subsequently obtained judgment; that the stock thus transferred was worth thirty thousand dollars, and the transfer to the bank was made in fraud of his rights as a creditor, giving them an unjust preference over him, as Chapman was then in insolvent circumstances, which fact was well known to the bank at the time of said transfer.

The plaintiff finally shows that he has been unable to collect the amount of his judgment, in consequence of the illegal and fraudulent transfer of the said stock to the bank, wherefore he prays that it be annulled; and that the said one thousand shares of stock be surrendered up to satisfy his judgment against Chapman, or in default thereof, that the defendants be condemned to pay the amount.

In a supplemental petition the plaintiff alleges that one thousand one hundred and eighty-five shares of stock, instead of one thousand, was transferred by the said Samuel Chapman, to the defendants, to secure and give them an unjust preference over other creditors, which stock was sold at a great loss and depreciated value. He also alleges that Chapman sold and transferred five hundred and twenty shares of the capital stock of the Exchange and Banking Company, at the same time, to the defendants, all of which is alleged to be in fraud of creditors. He prays judgment that said sales be annulled, &c.

The defendants pleaded a general denial to all the material allegations in both petitions, and averred that Chapman was indebted to them in the sum of sixty-two thousand six

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hundred and eighty dollars, and that at the time of contracting part of said debt, and while perfectly solvent, he pledged the stock mentioned in the petition to secure part of the same according to law; and that he subsequently transferred said stock in payment of the debt for which it was pledged, and at a fair price; that they are *bona fide* holders and owners of said stock for a valuable consideration, without prejudice to the rights of any other creditor of Chapman. They further plead the prescription of one year.

The original petition was filed the 15th August, 1838. On the 4th March, 1839, the syndic of the creditors of Samuel Chapman filed his petition of intervention, alleging that said transfers of stock were fraudulent and illegal, and gave an unjust preference to the defendants over the other creditors; and prayed that said sales and transfers be annulled; that the stocks thus transferred be declared to belong to the mass of creditors. The defendants, in answer, aver that Chapman had borrowed money on said stocks at a time when he was perfectly solvent, and possessed of much property; but afterwards, to prevent sacrifice, sold and transferred said stocks to them at a price greater than the highest market price.

Under these pleadings and issues, the cause was tried before the court and a jury.

The evidence showed that, on the 31st January, 1837, Samuel Chapman, by private act, executed before the cashier, pledged one thousand shares of the capital stock of the Atchafalaya Bank, to said bank, on which thirty dollars per share was paid, as collateral security, and to secure the payment of his three promissory notes, discounted in bank, amounting to twenty-eight thousand four hundred dollars.

On the 22d August, 1837, said Chapman, for value received, transferred all his right, title and interest in eleven hundred and eighty-five shares of the capital stock of the Atchafalaya Bank, to said bank, on which thirty dollars per share are stated to have been paid. This transfer is made by act under private signature.

On the 11th September, 1838, Chapman filed his petition

and schedule in court, and made a surrender to his creditors of all his property, and also prayed for the benefit of the insolvent law.

The evidence showed great embarrassment in Chapman's affairs, during the latter part of the year 1837. His notes were under protest, and he unable to meet his engagements. Upon the pleadings, and the evidence produced, the cause was submitted to the jury, under the following charge from the judge presiding, which was excepted to by the defendants' counsel :

"1. The question to be decided by the jury concerns the transfer of one thousand shares of stock, by Samuel Chapman, to the defendants, on the 23d August, 1837. The jury are to find, from the evidence before them, whether that transfer was made by Chapman, and accepted by the Atchafalaya Bank, with the intent of depriving the creditors of Chapman of their eventual rights, upon the property of Chapman.

"2. The claims or rights of the Atchafalaya Bank, under the pledges which it held previous to the transfer, are not at issue in this suit. The defendant has pleaded these pledges as showing that it gave a valid consideration for the transfer; but this plea does not alter the character of this action, which is a suit to annul the transfer, not to annul the pledges. It only modifies the relation of the parties, by alleging that, if any ground of nullity of the contract of transfer exist, it is not the want of a consideration.

"3. If the jury considers it proved that the transfer of stock made by Chapman to the bank was made for the purpose of securing a debt due by the former to the latter, and of giving to the latter a preference over the other creditors of the former, that such transfer gave an advantage to the bank over the other creditors of Chapman, and that, at the time of the transfer, the bank knew that Chapman was in insolvent circumstances, it will be the duty of the jury to give a verdict annulling said transfer.

"4. By being in insolvent circumstances, is meant that the amount of a person's property and credits are not equal, at a fair appraisement, to the debts due by the party. It

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after the latter had been shown by the plaintiff.

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"5. The effect of annulling the transfer would be to restore the parties to the same situation in which they were before the transfer was made. *Louisiana Code, art. 1977.*

"Therefore, in my opinion, the annulling the transfer would revive the pledge. But this is not a subject for the action of the jury in this verdict. It concerns the effect and operation of that verdict, and the judgment to be rendered upon it.

"6. The only prescription pleaded by defendants is the prescription of one year.

"The provisions of the act of 1817, concerning oppositions of creditors to the proceedings of their debtor, under that act, on the ground of fraud, as presumed in alienations made within three months previous to the failure, are foreign to the present suit.

"7. The prescription of one year is to be counted in this case, from the date of the transfer, if the jury should be of opinion that the only object was to secure a just debt.

"8. The present suit being instituted previous to a cession of property, by Chapman, was well instituted by a single creditor."

The jury returned "a verdict for the plaintiff." After an unsuccessful attempt to obtain a new trial, from judgment confirming the verdict and annulling the sale and transfer of the eleven hundred and eighty-five shares of stock, the defendants appealed.

Elmore and King, for the plaintiff.

1. This action was brought by the plaintiff to annul the transfer of a quantity of bank stock, made by Samuel Chapman, an insolvent, to the Atchafalaya Bank, upon the ground that the transfer was a fraud upon the rights of the plaintiff, a creditor of Chapman.

2. The evidence shows, conclusively, that the transfers annulled by the judgment of the court below, gave the bank

an unjust preference over the other creditors of Chapman, and that at the dates of the respective transfers, he was in insolvent circumstances, to the knowledge of the bank. Such a sale, so far as it affects the rights of the plaintiff, is fraudulent, and should be annulled. *Louisiana Code*, 1965, 1978-79-80.

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3. The verdict of the jury was in favor of the plaintiff. All questions of fraud are questions of fact. Upon questions of fact, the verdict of a jury is entitled to great weight, and will not be reversed by the Supreme Court, unless manifestly erroneous. *Benjamin & Slidell's Digest*, page 33, letter O, section 2, for references.

4. The intervenor has no right to interfere in this action. *Louisiana Code*, 1965. The syndic is clearly barred by prescription. See case of *Petit vs. His Creditors*, 3 *Louisiana Reports*, 26.

5. The evidence shows, conclusively, that the pledge, as well as the transfer, was fraudulent, unless it is saved by the plea of prescription. This leads us to an examination of the prescription pleaded. We contend that prescription does not cure the pledge; that it could not run in favor of the pledge after the transfer was made. The prescription pleaded, is that of twelve months, and is subject to the same rules, and liable to the same interruptions, which govern all prescriptions. If by the act of the defendants, they have destroyed the pledge by the transfer, they cannot set up prescription as to it. *Contra non valentem agere, non currit prescriptio*. See, also, the case of *Morgan vs. Robinson*, 12 *Martin*, 76. *Ayraud vs. Bubin's Heirs*, 7 *Martin*, N. S., 481. 3 *Louisiana Reports*, 221. 7 *Idem.*, 581.

6. We insist, on the part of the plaintiff, that it was not within his power, at any time within twelve months, to have brought an action to annul the pledge. It existed not quite seven months before it was extinguished or cancelled by the transfer. It was impossible to bring an action to annul the pledge after the transfer was made, as by this act it was already annulled; therefore, the authorities cited above are applicable to this case.

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7. The only action that could have been brought, was to cancel the transfer, and our action was in time for this; being instituted within twelve months from its date.

I. W. Smith and Cohen, for the intervenor.

1. The law gives the right to the revocatory action to one creditor only, when there is no cession of property. After the cession, the right to this action is given to the syndic only. *Louisiana Code*, 1965. His right to represent all the creditors is inconsistent with the right of one of them to act in his own name, and separately from the syndic. The right of the syndic to represent *all* cannot be restrained to a *part* of the creditors. The verdict and judgment should have been in his favor.

2. The property in the stocks remained in Chapman until his cession. The acceptance of it by the judge, vested all his property in his creditors. *Act of 1826, section 2. 2 Moreau's Digest, page 437.* The syndic is their only representative. Caldwell never had a privilege on these stocks. Long previous to his seizure, Chapman had become bankrupt. *Code of Practice, 722.* And no privilege exists without a law creating it. *Louisiana Code, 3152.*

3. The intervenor and plaintiff concur in submitting to this court, for its final decision, the question whether the verdict and judgment appealed from should have been rendered in favor of the intervenor or the plaintiff. The bank cannot have the case remanded to settle this question. (1.) The bank has an interest in the change now prayed for by the syndic. The bank is a large creditor, and is entitled to share in the dividend arising from this fund. (2.) The judgment rendered in the District Court will be *res judicata* as to the intervenor. He was present at the trial, adduced evidence, and the verdict most effectually passed on his rights, by giving the stocks or money which he asked to the plaintiff. (3.) The evidence to support the verdict and judgment is amply sufficient, without the testimony of the witnesses objected to by the bank as creditors.

Hoffman, for the defendants. Before the suit of plaintiff was at issue with the defendant, Chapman, the common debtor, made a surrender, and obtained a stay of proceedings against his person and property ; consequently the plaintiff was stopped. The syndic represented all the creditors, which supersedes and suspends the plaintiff's action. This has been settled to be the law, when the syndic is appointed before suit is brought ; and the same reason applies, if afterwards, but before judgment. 3 *Louisiana Reports*, 461.

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2. The charge of the judge is erroneous. The defendants relied on their rights as pledgees, and pleaded the same. But the judge *a quo*, and the counsel opposed to us, seem to think the transfer must be illegal, if Chapman was insolvent at the time. They, however, did not so consider it in their petition, and the law does not so consider it. The transfer was made in the usual course of business, because the pledge of the stock was taken when the money was loaned ; and Chapman could not have sold it to a third party and paid the money over to the defendants. Then why not be permitted to sell it to them, when he obtained the highest price ?

3. If this were a *datien en paiement*, it is the same, because it is not made to the prejudice of other creditors. The debts were due, and the property pledged to pay them Chapman had lost all control over, until they were paid. If given in payment at full price, how could it be to the prejudice of creditors ? On the contrary, it was to their advantage. It is amply proved, and not contested, that the defendants took the stock at a much higher price, and above what others would have given.

4. But it is attempted to attack and set aside the pledge and transfer on technical and other grounds. The pleadings, however, present but one ground, that of nullity, because of the illegal preference given to the defendants, over other creditors. This plea cannot avail. The doors are closed against all inquiry after one year, from the date of the contract. All the contracts of pledge were made more than a year before bringing suit to avoid them. *Louisiana Code*,

EASTERN DIST. 1973, 1978, 1982, 3131. 3 *Louisiana Reports*, 26. 12 *Idem.*,
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5. If it be said that not the contract of pledge, but the transfer alone is attacked, we answer, that if it is not sued for, it is contested and litigated, and in fact the whole forms but one contract. It cannot be said that one is to the prejudice of creditors without looking to the other. The transfer was not to their prejudice, because it was made in pursuance of a previous pledge.

6. The jury were told they must not inquire into the questions raised as to the pledge; that if the transfer was illegal, then the pledge revived. If the validity and effect of the pledges could not be gone into; the only judgment that could have been given, was, that things be placed in the situation they were before the transfer. The jury were misled by the judge's charge, and the verdict must, therefore, be set aside.

7. We conclude with two positions, in each of which we feel confident of success :

1st. That if the consideration for the transfer was the full value of the stocks at the time, and the same had been under a pledge from a period more than a year previous to the bringing of this suit, further inquiry is closed by prescription.

2d. That if the pledges were valid at the time of the transfer, and gave to defendants all the rights of pledgees, that then a transfer of the stock to defendants, at its full value, was not an act or contract to the prejudice of the other creditors, and cannot be set aside.

Grymes, for the plaintiff, Caldwell, submitted the following argument in writing :

The material facts in this case, as to be found in the record, are :

1st. That Chapman pledged the stock to the bank on the 31st January, 1837.

2d. That this pledge was annulled on the 22d of August, 1837, and a complete sale and transfer of the stock made to the bank on that day.

3d. That Chapman was insolvent when the pledge was made, as well as at the time of the transfer.

4th. That they were both made to secure or pay a pre-existing debt, and consequently were fraudulent and void as against creditors.

5th. The plaintiff's action to annul the transfer was commenced on the 15th of August, 1838.

And the question arises :

1st. Whether the setting aside the sale or transfer of the stock for fraud, revives the pledge.

2d. If it does revive it, whether it does revive it, subject to the objection of the fraud which existed at the time it was annulled or merged in the transfer, or purged of the fraud by the prescription of one year, agreeably to the article 1982, of the Louisiana Code.

It is proposed only to trouble the court at this time with some observations on the second and last of these propositions.

I. And first, it is submitted whether prescription can be said to run in favor of a thing not in existence ? It is clear from the testimony in the record that the pledge was annulled in August, 1837 ; that both parties, pledgor and pledgee, considered it so ; and that between them it had no existence after that day. From this it would appear to result that no action would lie. It would have been a sufficient answer to such a suit to have shown that no such thing was in existence, and that no party to it claimed any thing under it. The plaintiff in such a suit could have no means of proving that any such act ever existed, for although the law invests acts of pledge passed before the cashiers of banks with some of the attributes of public acts, yet it is a fact, that they remain in the custody of the bank, and their existence may never even be known or suspected until the expiration of a year, and thus the greatest frauds may be consummated without any knowledge on the part of those who are to be their victims, until they are sanctioned by prescription of a year. The article 1982, of the Louisiana Code, creates the prescription in general terms without giving any particular rule by which it is to be governed or applied. It is pre-

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sumed, then, that it is to be taken, subject to all the general principles and rules which govern in other cases of prescription.

The first principle to be applied to this case, then, is that the prescription in such a case cannot run against third persons, as to acts which they have an interest to annul, and to which they were not parties, but from the time at which they became known to them. *Vazeille Traité de Prescrip.*, p. 227, No. 334.

Now, when did the existence of this pledge become known to the plaintiff? It is clear from the record that the first intimation was when the defendant produced it in his defence to the action brought by the plaintiff to annul the sale or transfer; and there is no circumstance to contradict or cast even a suspicion upon this position. The pledge had been passed before the cashier of the bank, which is, to all intents and purposes, the bank itself. A party to the fraud complained of, remained up to the time it was cancelled or annulled in the sole and exclusive custody and possession of the knowledge of its existence; confined to the parties to the act who were both participators in the contemplated fraud. And the inference of a total want of knowledge, as it regards all but the parties, is strengthened and confirmed by every circumstance in the case. The case is, then, a fair one for the application of this principle. The article 1989, of the Code, does not conflict with this position; as appears clearly from the case of *Petit vs. His Creditors*, 3 *Louisiana Reports*, 26, where this court decided that to give effect to both articles of the Code, the article 1989 must be taken as relating to another description of cases, viz: those where there was some other mark of fraud besides a mere preference.

II. The next principle applicable to this case is, that an undivided thing cannot be possessed by two distinct titles, different in their nature and claim, by prescription under both. *Vazeille Traité de Prescrip.*, p. 47, No. 121.

The possession by pledge was under a precarious title. That by the sale or transfer was translatif of the property, and totally different in their nature. The possession under

the two titles cannot then be united so as to acquire the complete indemnity to the fraud with which they were both tainted by the prescription under the article 1982, of the Code.

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Although the law gives an indemnity by lapse of time for acts of this nature, yet it is certain that the whole term must expire before the indemnity is acquired; and on the other hand, it is equally certain that the parties injured by those acts have to the expiration of the last hour of the time, to annul them. It appears that the pledge came into existence on the 31st January, 1837. It is equally clear that it was annihilated on the 22d of August, 1837; the testimony is conclusive as to this, that it was cancelled and destroyed, and the whole matter settled by the transfer, with the consent of all the parties to it.

When this took place, there was five months of the time yet to run; the thing to be annulled at the suit of the creditor aggrieved, had no longer any existence; it was gone or merged in another contract, differing from it in its very nature and essential qualities and effects; all its effects upon the immediate parties to it were lost and destroyed, and by consequence its effects upon third persons; and the possession under the new title took its date from that time; and putting aside the want of all knowledge on the part of the plaintiff of the existence of the first contract, any action to annul that which the parties themselves had annulled, was useless, and would have resulted in nothing. Yet at the time this contract was extinguished, the party aggrieved by it had five months of the time allowed by law to attack it; how has he lost this time? It is presumed that he could only lose it by the continual operation of this act upon the thing or subject matter to which a destination was intended to be given. This is the foundation of all prescription, and this is the fair interpretation of the article of the Code creating it; it did not so continue to operate upon the thing, or govern its destination. The thing itself was translated by the second act; received a different destination; was held and possessed by another title; and during the remainder of

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the time allowed to the creditor to attack the transaction, the only visible contract ; the only one in existence ; the only one to be annulled, was the contract of sale. He does this within the time prescribed by law, and upon his proving clearly the fraud, and its consequent nullity. It is pretended that the first act, founded on the same consideration, tainted with the same fraud, is *revived*, and is now in full force by lapse of time, inattackable for the fraud by prescription.

Upon what principle is it to be sanctioned, that a party shall, by his own act, by fraud and collusion with another, extinguish an act in itself fraudulent, supply its place by another equally fraudulent, and when he fails to sustain his fraud and collusion on the last, revive the first, and protect it by lapse of time, when the party defrauded, had, at the extinguishment of the first act, nearly one-half of the time allowed by law to attack it ? This would be allowing to the party guilty of fraud the full benefit of the term running in favor of a thing which was a dead letter, with no life or existence, and denying to the party defrauded the full benefit of a large portion of the period of the time allowed him by law to redress his grievance. We think the only just conclusion that the circumstances of this case will warrant, is that, if the pledge is revived at all, it is revived, subject to all the objections that might have been made to it at the time it became extinct.

This conclusion is in accordance with principles laid down by this court in the case of *Morgan vs. Robinson*, 12 *Martin*, 76, and in 11 *Louisiana Reports*, 532. 1 *Martin*, N. S., 458; 4 *Idem*, 500 ; 7 *Idem*, 481.

The article 3126, of the Louisiana Code, declares that "the acts of pledge in favor of the banks of this state *shall be considered* as forming authentic proof, if," &c., &c. The general provision of this article of the Code does not constitute the cashiers of the banks officers, with authority to pass acts of pledge in all cases. Nor does it make all acts of pledge that may be passed by them *public* and authentic acts. The sense of this article must be governed and controlled by the charter of the bank itself, and only such acts

can be embraced by it as, by the charter, the bank was empowered to exact, and under the circumstances contemplated by the charter.

The 19th section of the charter of the Atchafalaya Bank is the only one which speaks of the pledge, and that only incidentally, and it embraces only the case of loans made on a pledge of the stock of the bank.

In the present case, it does not appear that there was any loan made by the bank on the pledge of this stock, but that the debt had been previously contracted to the bank, and the pledge made to secure it. Now, if the power of cashiers to pass acts is not to be confined to cases clearly contemplated by the charter, then the material interests of individuals may be compromised by acts passed before one of the contracting parties, of which he alone has the custody, not spread upon any public record, nor any obligation imposed to make them public, or even to exhibit them, or acknowledge their existence on inquiry, and all means of notice denied, contrary to the spirit of our whole legislation on the subject, which requires the recording in a public office, and at a time not suspicious. This defect, if it be one, is not cured by prescription, but goes to the act itself.

Bullard, J., delivered the opinion of the court.

This is a revocatory action, by which the plaintiff, one of the creditors of Chapman, an insolvent debtor, seeks to annul a transfer of stock made to the defendants, in fraud of his rights. The only ground of fraud alleged is, that the insolvent thereby gave an unjust preference to the bank, also his creditor, and having a full knowledge of his insolvency. After the surrender of Chapman, the syndic of his creditors intervened, and joining the plaintiff in his demand of nullity, claims that the stock should be restored to the mass of the insolvent's property.

This *dation en paiement* to the bank was made, we do not doubt, under circumstances which would render it null, as to other creditors, on the ground of an unjust preference, had it not been for a previous contract of pledge between the

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Where bank stock is pledged to secure a debt to the bank, and is afterwards transferred, in payment, at its full value; although made on the eve of insolvency, it does not prejudice other creditors, and is not fraudulent as to their rights.

parties, by which the stock in question was specially affected to secure the payment of a large debt due to the bank. If that contract was valid, then the preference complained of already existed, and the only remaining inquiry would be, whether the subsequent sale of the stock was for an inadequate price, and to the injury of the complaining creditors? The contract of pledge took place more than one year previously to the institution of this suit; and there is a plea of prescription.

We are quite satisfied that the sale of the stock to the bank was but a consummation of the contract of pledge; and that, if the sale itself were declared void, the pledge, together with the preference which it confers, would revive; because the parties are to be placed in the same condition they were in before the transaction complained of; and we concur with the counsel for the appellant in the proposition, that, if the pledge was valid at the time of the transfer, and the stock was transferred at its full value, then the contract did not prejudice other creditors, and consequently cannot be set aside.

This brings us to the inquiry whether it be now too late to question the validity of the contract of pledge, which had existed more than a year before the institution of this suit?

Article 1982 declares that no contract between a debtor and one of his creditors, for the purpose of securing a just debt, shall be set aside by this action, although the debtor was insolvent to the knowledge of the creditor, and although the other creditors be injured by such contract, if such contract was made more than one year before the suit brought to avoid it, and if it contain no other cause of nullity than the preference given to one creditor over another.

The revocatory action, to set aside a contract by an insolvent debtor to a creditor, to secure a just debt, is only applicable to a particular class of cases, in which the only ground of nullity, is an undue preference given to one of the creditors, and suit must be brought within a year from the date of such contract.

To this it has been answered, that, by a subsequent article, to wit, 1989, the action, it is true, is limited to one year; but if brought by a single creditor, to run from the date of judgment, against the debtor; and if, by a syndic, or other representative of the creditors collectively, from the day of their appointment. It has been argued that this latter article is inconsistent with the one first cited, and must control it.

The court is bound, if possible, to give some effect to both articles; and they are easily reconciled by considering article 1982, as applicable to a particular class of cases, in which the only alleged ground of nullity is an undue preference given to one of the creditors of an insolvent; and the other article, as applicable to all other contracts, by which creditors are injured. Such is the view which this court took of these provisions of the Code in the case of *Petit vs. His Creditors*, 3 *Louisiana Reports*, 26.

With this view of the case, and under the agreement made by counsel in this court, we do not think it important to examine several questions which arose on the trial below, but considering that the stock is shown to have been sold for its full value at the time, and to satisfy a debt privileged to be paid out of it by a contract no longer liable to be attacked by other creditors of the insolvent, either individually or collectively; and, consequently, that the complaining creditors have not been injured by the sale of the stock to the bank, we think ourselves authorized to declare that the plaintiffs are not entitled to the remedy they seek.

The judgment of the District Court is, therefore, reversed; the verdict set aside, and judgment is here given for the defendants, with costs in both courts.

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ANDREWS &
HOLMES
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CHANEY.

But the revocatory action may be brought within a year, by a single creditor, from the date of his judgment against his debtor, or by a syndicate, representing all the creditors, within a year from his appointment, to set aside all contracts of the insolvent debtor by which creditors are injured.

ANDREWS & HOLMES VS. CHANEY, (TWO CASES,)

In which the appeal was dismissed, because the sum in controversy was less than three hundred dollars.

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PAULDING

VS.

BARKER.

PAULDING VS. BARKER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

There was no ground on which to expect relief on an appeal, and the judgment was affirmed with ten per cent. damages.

This is a suit against the defendant as maker of a promissory note. He obtained an injunction on the ground of payments made, and propounded interrogatories to the plaintiff. The latter answered, that seventy dollars had been overpaid on a previous instalment by the defendant. The district judge perpetuated the injunction as to this sum, and dissolved it for the remainder of the plaintiff's claim. The defendant appealed.

Larue and Preston, for the plaintiff.

Barker, in *propria personâ*.

Bullard, J., delivered the opinion of the court.

The defendant is appellant from a judgment dissolving his injunction as to a part of the plaintiff's demand, and rendering it perpetual as to a small portion. His only witness was his adversary, whose disclosures, on oath, guided the court in its decision. No attempt was made to show that the appellant was entitled to a larger credit than had been allowed, and we do not perceive on what ground the appellant could have expected any relief from this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

ROBINSON & CO. *vs.* ARMSTRONG.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.ROBINSON & CO.
vs.
ARMSTRONG.

The appeal taken for delay evidently, and judgment affirmed with ten per cent. damages.

This suit is instituted against the maker of a promissory note, under protest. The defendant admits his signature to the note sued on, but denies that he is liable, or that the plaintiff is the true owner of it; but that it belongs to one P. M. Montgomery, who, it is averred, has brought suit in the District Court, and obtained an order of seizure and sale against a slave in defendant's possession, under mortgage for the payment of this note. He prays to be dismissed with his costs allowed.

It was admitted suit had been brought by P. M. Montgomery as averred, but that it had been discontinued. The plaintiff proved ownership of the note, both before and since its maturity. Judgment was rendered against the defendant, and he appealed.

Harrison, for plaintiff.

Clarke, contra.

Morphy, J., delivered the opinion of the court.

This suit was brought on a promissory note duly protested for non-payment; no serious defence being made, judgment was given for the plaintiff in the court below, and the defendant has taken this appeal. That it is intended for delay only is evident; the damages prayed for by the appellee must, therefore, be allowed him.

It is ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with ten per cent. damages on the amount of the note, and costs in both courts.

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DIGGS
VS.
M'HENRY.

DIGGS VS. M'HENRY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

Appeal evidently taken for delay, and judgment affirmed with ten per cent. damages.

This is an action against the defendant as acceptor of a draft. Several matters were set up in the answer, by way of defence, but no attempt was made to prove them on the trial. Judgment was rendered against the defendant for the sum claimed, and he appealed.

Elmore and King, for the plaintiff.

M'Millen, contra.

Morphy, J., delivered the opinion of the court.

The defendant being sued on a draft accepted by him, set up in defence divers matters which, upon the trial, he made no attempt to prove; from the judgment rendered against him below, he now prosecutes this appeal evidently for the purpose of delay. The appellee is entitled to the damages he prays for.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per cent. damages on the amount of the draft, and costs in both courts.

ALLAIN & TREMOULET VS. LAZARUS.

EASTERN DIST.
February, 1840.APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE
PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.ALLAIN & TRE-
MOULET
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The general rule is well settled, that, when a promissory note is made payable at a particular place, a recovery cannot be had on it, without proof of a demand at the place of payment.

There are exceptions to the general rule, and by the commercial law it is not necessary for the payee to prove a demand of the acceptor of a bill in order to recover of *him*, but it is necessary to show his default to charge the endorser.

So, where the payee is in possession of a note, the burden ought to devolve on the obligor or maker to show a readiness and offer to pay, or funds placed in the hands of the payee for that purpose, if he wishes to exonerate himself.

The testimony of one witness, corroborated by a mortgage, will be deemed sufficient to prove an open account over five hundred dollars, when it appears the mortgage was given to secure payment of all liabilities the plaintiffs were to come under for the defendant; and that the account embraced these objects.

This is an action against the maker for the amount of five promissory notes; and on an open account for interest, drafts and acceptances paid, and goods furnished, &c., according to an account annexed. The notes were drawn, payable to the order of the plaintiffs, at their counting-house, in New-Orleans; and a mortgage taken on several tracts of land and lots of ground to secure the payment, not only of the five notes sued on, but of all other promissory notes, drafts, bills of exchange, and all other engagements, liabilities and responsibilities, by the said firm of Allain & Tremoulet, on an account of said Isaac Lazurus, &c.

The plaintiffs pray judgment for the amount of their demand, including the notes and account, and that the mortgaged property be seized and sold to satisfy said judgment.

The defendant pleaded a general denial. On the trial, the defendant's counsel objected to the notes being given in

EASTERN DIST. evidence, because there was no proof of a demand of payment of said notes at the place where they were made payable. The court admitted them, and the defendant took his bill of exceptions.

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The account was proved by a single witness, who testified that he presented it, excepting the interest since added, and the defendant acknowledged the correctness of it and asked time for payment. The mortgage was also produced on the trial.

On this evidence, the jury returned a verdict for the plaintiffs. After an unsuccessful effort to obtain a new trial, from judgment confirming the verdict, the defendant appealed.

Pichot, for the plaintiffs, said the defendant had based his defence on two grounds :

1st. That the promissory notes ought not to have been received in evidence, because no evidence was offered that they had been presented for payment at the place indicated, and no protest was made of those notes.

2d. That plaintiffs did not make out their case on the other notes mentioned in the account current ; that there was but one witness without corroborating circumstances.

In support of the first ground, several decisions of the Supreme Court have been cited, which it is unnecessary to notice, not being applicable to the present case.

In this case the payment was to be made at the counting-house of plaintiffs, who were the holders and owners of the promissory notes mentioned in the account current sued on. Can it be pretended, with any shadow of reason, that plaintiffs were to put the notes in the hands of a notary, and require him to ask from themselves if they had any money of defendant in their hands to meet the payment? *Inutilia abhorret lex*. In none of the cases alluded to by defendant, did the notes belong to the banks or persons at the domicile of which they were made payable ; and it is evident that, if it had been the case, the Supreme Court would have decided in a different manner, and in conformity with our present request. If there could be any doubt upon the subject, one

of the authorities cited by defendant in support of his position, would decide it in our favor. See the case of *Smith vs. Robinson*, 2 *Louisiana Reports*, 405.

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2. The verdict of the jury is conclusive on this point. There was abundant evidence to support the account. In addition to the testimony of one witness, the mortgage was produced in evidence, which was a strong corroborating circumstance in proof of the account. The jury were fully satisfied of its sufficiency.

Hennen, for the defendant and appellant.

1. The counsel for the defendant contends, that no action can be maintained on these five notes, until a demand has been made, at the counting-house of Allain & Tremoulet, in New-Orleans; and, consequently, until proof is made of such demand, that the notes could not be given in evidence. There is not, in the petition, even an allegation that demand was made of payment of these notes, at the counting-house of Allain & Tremoulet. Therefore, on an order of seizure and sale, on the mortgage given for securing their payment, the order would be set aside, although it was alleged that payment was duly and amicably demanded of the defendant. See the case of *Moss vs. Byrnes*. 12 *Louisiana Reports*, 615. A case equally strong, if not stronger, is found in the same volume, 472, *Warren vs. Briscoe*, when the notary stated in his protest that "he went to the Planters' Bank, Natchez, (where the note was made payable,) and was informed by the teller that there were no funds in bank for the payment of the above mentioned note."

But the court decided "that a demand of payment and presentment of the note, at the place indicated by the instrument itself, are indispensable to the recovery," and non-suited the plaintiff.

In the same volume, page 454, *Warren vs. Allnutt*, the court maintained the same principles, and say: "It has frequently been held by this court, that no recovery would be had in such cases, unless demand of payment be made at

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2. In *Morton vs. Pollard*, 10 *Louisiana Reports*, 552, the court says: "The demand at the place (indicated in the note) was a condition precedent, which the plaintiff was bound to allege and prove. But in this suit, there is neither allegation nor proof of the demand, at the counting-house of Allain & Tremoulet. The same point is decided in *Smith vs. Robinson*, 2 *Louisiana Reports*, 405. All which cases are in accordance with the first case decided by this tribunal. 3 *N. S.*, 423. *Mellon vs. Croghan*.

3. The jurisprudence of the court having been thus repeatedly settled, it is presumed no deviation in it will now be made; consequently, the court erred in admitting the evidence, and the cause should be remanded for a new trial.

4. The plaintiffs did not make out their case on the other notes mentioned in the account current sued on; for none of these notes were produced. They amount to six or seven thousand dollars, and there was but one witness, without corroborating circumstances, to establish them. *Louisiana Code*, art. 2257. The notes themselves, being the best evidence, should have been produced and filed. Without them the plaintiffs had no right to judgment for their account.

Bullard, J., delivered the opinion of the court.

This is an action upon sundry promissory notes, and upon an account for moneys advanced and goods sold, as well as for commission as factors. It is alleged that the amount due is secured by special mortgage. There was a verdict and judgment for the plaintiffs, for a large part of their demand, and the defendant appealed.

The appellant has relied upon two points. 1st. That the notes were improperly admitted in evidence without proof of a previous demand of payment, at the place at which they were made payable.

2d. That the testimony of a single witness, not corroborated by other circumstances, was insufficient to prove the

demand on the account, which greatly exceeded five hundred dollars. EASTERN DIST.
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I. The five promissory notes sued on, secured by mortgage, were made payable at the counting-house of the present plaintiffs, who were the original payees. The general rule is well settled in this court, that, when a promissory note is made payable at a particular place, a recovery cannot be had upon it without proof of a demand at the place of payment. 3 *Martin, N. S.*, 423. 10 *Louisiana Reports*, 552.

But we are of opinion that the case now before us forms an exception to that rule. The commercial law, as understood by some of the courts of the United States, and perhaps in England, does not render it necessary for the payee to prove a demand of the acceptor, in order to recover of him, but it is necessary to show his default in order to recover of the endorser or the drawer. *Chitty on Bills*, 394. In the case before the court the maker of the note contracted the obligation to repair to the counting-house of the payees, and to make payment. They must be presumed always ready and willing to receive; and when it is shown that the payees are still in possession of the note, the burden ought to devolve on the obligor to show a readiness and offer to pay on funds placed in the hands of the payee, for that purpose, if he wishes to exonerate himself. *Wallace vs. McConnell*, 13 *Peters' Reports*, 136.

So, where the payee is in possession of a note, the burden ought to devolve on the obligor or maker to show a readiness and offer to pay, or funds placed in the hands of the payee for that purpose, if he wishes to exonerate himself.

II. Upon the second point, it appears that the case was left to the jury. A single witness deposed that he had presented the account to the defendant, except the interest since added; the defendant acknowledged the correctness of the account and asked time for payment. The account current shows, on the debit side, some goods sold, drafts accepted and paid, and notes taken up, together with commissions; and on the credit side, the proceeds of various shipments of cotton, &c., in the usual manner of accounts of a commission merchant. The balance of that account, for which the verdict was rendered, greatly exceeds the sum of five hundred dollars; and, consequently, a single witness, without

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It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

DUNBAR vs. THOMAS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF WEST FELICIANA, JUDGE MORGAN, THEN JUDGE OF THE DISTRICT, PRESIDING.

6. N. 458

Where an administrator sues in the District Court, and exhibits evidence of his appointment, this court cannot inquire, collaterally, into the propriety of such an appointment by the Court of Probates.

An administrator has the right to enforce payment of all debts due to the estate he administers, which are still in his hands, and the proceeds of which, when paid, are liable to the debts of the estate.

This is an injunction suit to stay an order of seizure and sale. The plaintiff purchased, in January, 1836, four slaves at the probate sale of the succession of Mary Bennett,

deceased, for the price of \$3,800, payable in three equal annual instalments ; for which he gave his notes with mortgage on the slaves until complete payment. The defendant having been subsequently appointed administrator of said estate, in the place of one G. H. Patillo, who was first appointed, proceeded by the executory process against A. Dunbar, the maker on the second note, when he was stopped by this injunction.

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The plaintiff alleges, that since the sale and the execution of his notes, there has been a partition of the assets and property of the estate of Mary Bennett, deceased, among her heirs ; that said notes belong to the heirs ; and that he has paid a part of the debt to one of them, who has given him further time for the balance ; and another part to the tutor of the other heirs, from whom he has received a like indulgence.

He further alleges, that the defendant has no right to receive this debt as administrator, and is consequently without authority to proceed against him on the mortgage, and to obtain an order of seizure and sale. The defendant denied that any partition was ever made, but that in 1835, the tutor of the minors Bennett, accepted the succession of their deceased mother, with benefit of inventory on their behalf, after being duly authorized ; that no partition could be made until a final settlement of the estate, and none of the heirs had any authority to receive any portion of said debt, &c. He prays that the injunction be dissolved with damages.

On the trial it appeared in evidence that, when the succession of Mary Bennett was opened, it was accepted by the heirs with benefit of inventory, and George H. Patillo, who married one of them, was appointed administrator, who rendered his account in October, 1836, and was discharged. In November following, the defendant, Thomas, was appointed, and took charge of the assets of said estate.

In the meantime, in February, 1836, on the application of one of the heirs, a partition among all the heirs of the estate of Mrs. Bennett, had been made out by the probate judge, acting as notary public, and signed. This act of partition was

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never homologated, and the defendant was afterwards appointed to administer on the discharge of his predecessor, and the notes in question were put in his hands for collection. One or two of the heirs admitted they had promised indulgence to the maker of the notes, and some partial payments were shown.

There was judgment, however, dissolving the injunction, with ten per cent. damages. After a strenuous and unsuccessful attempt to obtain a new trial, the plaintiff appealed.

Turner, for the plaintiff and appellant.

1st. The injunction which had been obtained by the plaintiff against the defendant was legally and properly granted, and ought to have been rendered perpetual.

2d. The defendant having expressly, in his answer, put at issue the regularity and legality of the appointment as administrator to the estate of Mary Bennett, the plaintiff had a right to show that his appointment was a nullity, and for that purpose to show that the Court of Probates was without jurisdiction.

3d. It is fully shown that the estate of Mary Bennett had been fully administered, and the administrator discharged; and that the property of the estate had been partitioned, and had passed into the possession of the heirs. From that time the Court of Probates was without jurisdiction, and the subsequent appointment of Joseph B. Thomas was a nullity.

4th. A recovery by him of the debt owing by the plaintiff for property purchased by him at the probate sale of the estate of Mary Bennett, would not have been a bar to the right of the heirs to recover the same debt.

5th. The court erred in rendering a judgment for damages against the plaintiff, and against his security.

6th. It is not shown by the testimony that Thomas, as administrator, had the legal right to collect the note for which he took out the order of seizure and sale.

7th. Damages not allowed in case of doubt or where there is a credit allowed. 11 *Louisiana Reports*, 483. 6 *Louisiana Reports*, 310, 311 and 312.

Wherefore he prays that the judgment may be reversed, and judgment rendered in favor of the plaintiff, Dunbar, at least for so much as he paid to one of the heirs; and that the judgment for damages be reversed, and judgment given in favor of the plaintiff for the special damages proved against defendant, and general relief.

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Andrews and *Thomas*, for the defendant, prayed the affirmance of the judgment dissolving the injunction, but that it be amended so as to allow twenty per cent. damages.

Bullard, J., delivered the opinion of the court.

The appellee, as administrator of the estate of *Mary Bennett*, deceased, having sued out an order of seizure and sale upon a mortgage given to secure a debt due to the estate, was arrested by an injunction obtained by the debtor and present appellant, founded on the allegations that the estate had been partaken, and the debt in question allotted to several of the heirs; that he had paid one of them a part of the debt, and two hundred dollars to the tutor of another, both of whom had given him time, and did not authorize the order of seizure and sale. He denies the legal right of the plaintiff to sue out the order of seizure.

The answer avers, that the defendant in injunction, is administrator of the estate, and denies that any legal partition has been made. He alleges, that the estate was accepted under benefit of inventory, and that no partition could be made until the settlement of the administrator. He denies the right of the several heirs to receive any part of the debt due by the appellant until after the settlement of the succession.

The administrator having exhibited evidence of his appointment, the District Court could not inquire collaterally into the propriety of such an appointment by the Court of Probates. The only remaining inquiry, therefore, appears to us to be, whether the debt in question belonged to the estate and still formed a part of the assets upon which the plaintiff was to administer, or whether it had been withdrawn from the mass and partitioned among the heirs.

Where an administrator sues in the District Court, and exhibits evidence of his appointment, this court cannot inquire, collaterally, into the propriety of such an appointment by the Court of Probates.

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An administrator has the right to enforce payment of all debts due to the estate he administers, which are still in his hands, and the proceeds of which, when paid, are liable to the debts of the estate.

The record shows that the appointment of the administrator was subsequent to the proceedings had in the Court of Probates, which are styled a partition, and he appears to be in possession of the evidence of the debt. Indeed, the partition amounts to little more than a calculation of the amount of the share which will be coming to each heir after all collections are made, and the payment of the debts. The notes due by Dunbar are not assigned and delivered to different heirs, but simply an agreement, sanctioned by an order of the court, that the heirs are to be paid in different proportions a part of their shares out of these notes. It is rather a disposition of the proceeds of the notes after they shall have been received, than an assignment of them. They, therefore, still belonged to the estate, liable to the payment in the first place of the debts, and the administrator had, in our opinion, a right to coerce their payment.

The judgment against the principal and surety on the injunction bond, appears to us such as the statute authorizes on the dissolution of an injunction.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TOUTAIN vs. HIS CREDITORS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An affidavit which states that the insolvent has received, as depositary, certain property which he refuses to deliver up to the claimant, is insufficient to obtain an order of arrest. These circumstances are in no way calculated to induce the belief that the debtor is about to depart from the jurisdiction of the court, or secrete his person from his creditors.

The plaintiff filed his schedule and petition, making a surrender of his property to his creditors, and praying for the benefit of the insolvent laws.

André Marchesseau made affidavit that the insolvent was really indebted to him in the sum of five thousand five hundred dollars, and that he verily believes said debtor intends departing from the jurisdiction of the court, to secrete his person from his creditors ; and the reasons which induce him to this belief are, that the said Toutain has received as a depositary two boxes of ready made clothing of the value of two thousand five hundred dollars, and that he refuses to deliver back to this affiant said boxes, saying that he has sent them ; thereby intending, as he believes, to defraud this affiant and secrete his person from his creditors. On this affidavit the debtor was arrested. His counsel took a rule to have the arrest set aside, which was made absolute, the order of arrest set aside, and Marchesseau appealed.

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Pepin, for the appellant, contended that an unfaithful depositary cannot make a cession of his property and obtain the benefit of the insolvent laws. *Louisiana Code*, art. 2929, 2170. *Acts of 1817*, sec. 25 : *verbo*, "Surrender."

2. A depositor may, at any time, sue and obtain judgment against an unfaithful depositary. This is not the case of an ordinary failure ; so far from it, that, as regards the depositor, he must be considered as not having failed.

3. Admitting that this proceeding should come in, by way of opposition, it is in time, counting ten days from that on which the proceedings were filed in court. The law says ten days after the appointment of the syndic ; and can it be said that there is a syndic appointed, until he furnishes security according to law ? 2 *Moreau's Dig.* 429. *Pandelly vs. His Creditors*, 9 *Louisiana Reports*, 389.

4. The proceedings before the notary were only filed in court the day before the arrest was set aside, and it appears there is no syndic in this case.

Bodin, contra.

Morphy, J., delivered the opinion of the court.

André Marchesseau, a creditor of this insolvent, appeals from a decree setting aside an order of court made a few days after the filing of the schedule, on appellant's affi-

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An affidavit which states that the insolvent has received, as depositary, certain property which he refuses to deliver up to the claimant, is insufficient to obtain an order of arrest. These circumstances are in no way calculated to induce the belief that the debtor is about to depart from the jurisdiction of the court, or secrete his person from his creditors.

davit, made in pursuance of article 223, of the Code of Practice. This affidavit sets forth that the insolvent had received, as a depositary, two boxes of ready made clothing of the value of two thousand five hundred dollars, and that he refused to give them back to affiant, saying that he had already delivered them up. These circumstances were in no way calculated to induce the belief that insolvent intended to depart from the jurisdiction of the court, to secrete his person from his creditors. They only disclose the nature of affiant's claim, and insolvent's refusal, to satisfy him. Such an oath, showing only indebtedness and refusal to pay, could safely be made on every occasion, and cannot, therefore, be considered as a compliance with the above cited article. But passing by the insufficiency of the affidavit, we entirely concur with the judge below, that, even if the order of arrest had properly issued, the debtor was entitled to his discharge. The arrest authorized in cases of this kind has, for its object, to secure the presence of the insolvent within the jurisdiction of the court, until the homologation of the proceedings on his surrender. In this case no accusation of fraud appears to have been made against Toutain by any of his creditors. From the moment, therefore, that the proceedings were duly homologated, the insolvent was entitled to be discharged from imprisonment, under the twenty-seventh section of the statute of 1817, on the subject of voluntary surrenders. But the appellant contends that Toutain is not entitled to the benefit of our insolvent laws, being, as he alleges, an unfaithful depositary. This he should have established contradictorily with the insolvent on a charge of fraud, or in a direct action, for the return of his alleged deposit; but from his own showing he could have supported neither; for, in a petition filed after the arrest, he alleges that these boxes had been given to the insolvent as a pledge for the payment of a sum of money, and prays that they be sequestered by the sheriff, on the allegation that he had discharged the debt, thus falsifying his own affidavit made the preceding day.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

COLLINGS vs. HAMILTON.

EASTERN DIST.
February, 1840.APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF WEST FELICIANA, JUDGE DAWSON, PARISH JUDGE, PRESIDING.COLLINGS
vs.
HAMILTON.

Where the plaintiff sues to recover the value of work and labor done for the defendant according to a bill of prices agreed on, for part of it, and for extra work, he will be allowed to produce testimony *of the value* of all the work performed.

In an action on a special agreement for the *price* of work, or services rendered, the party may introduce *proof of the value* also.

This is an action on an account for work and labor done, at the instance and request of the defendant, in the construction of a large gin-house, cotton press and castings for four gin stands, according to an account annexed, of one thousand six hundred and twenty dollars.

The defendant pleaded a general denial, and required strict proof of every allegation, not admitted. He avers, the plaintiff undertook to complete a gin-house of large size, and with two gin stands and running gear; also, a cotton press; all to be completed in five months for the *price of one thousand five hundred and twenty-six dollars*, according to a written contract. That said gin was not completed in a workmanlike manner, and not finished for several months after the time agreed on. He sets up a boarding account of two hundred and fifty dollars, which he alleges the plaintiff is bound to pay, and various other items, which he avers should be deducted for deficiency in the work, thereby reducing the plaintiff's demand nine hundred and seventy-two dollars, and the amount of the boarding account.

On these pleadings and issues the cause was tried. There was a mass of testimony taken, and witnesses offered to prove the value and manner in which the work was done; as also to establish the defendant's averments in his answer. His counsel objected to any testimony being received, going to prove the *value* of the work and services of the plaintiff, because there was a particular agreement and bill of prices

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entered into between them which must govern as to the prices. He also moved the court to instruct the jury, that if they believed, from the testimony, the plaintiff and defendant had agreed on the prices to be paid for the work and labor done, they must exclude all evidence of the *value*. 2. That the action being on a *quantum meruit* for work and labor done and materials furnished, and the defendant having averred that it was done under a contract between them for a specific price; if the jury believed from the evidence there was such a contract entered into, they must find for the defendant; and also that the plaintiff could not recover for extra work in the present form of action. The judge refused these instructions, and the defendant took his bill of exceptions.

The jury returned a verdict for the plaintiff in the sum of one thousand six hundred and twenty dollars; and the court being of opinion it was in accordance with the law and evidence, rendered judgment thereon, from which defendant appealed.

Turner, for the plaintiff, urged the affirmance of the judgment.

Lobdell, for the defendant, insisted that the action on a *quantum meruit* could not be maintained when it was shown there was a specific contract, fixing the value and amount of the work done.

2. The court below erred in not charging the jury to exclude the evidence which went to prove *the value* of the work and labor done, as on a *quantum meruit* when a written contract was proved; or to establish the value of the work, when the contract fixed the price.

Morphy, J., delivered the opinion of the court.

The plaintiff seeks to recover one thousand six hundred and twenty dollars seventy-four cents, for work and labor done for defendant, in the erection of a large cotton-gin. An account is annexed to his petition, showing the details of the work and the prices for each item, which prices the plaintiff

avens defendant assumed and promised to pay. This claim is resisted on the ground, that plaintiff undertook to build a complete gin-house and put up a press for him for one thousand five hundred and twenty-six dollars twenty-four cents, on defendant furnishing all the necessary materials; that the work was so badly and unskillfully executed that defendant had to expend large sums of money to prop and sustain the roof, and remedy divers other defects; and moreover, that the work was delivered long after the time agreed on, by which delay defendant has suffered material injury.

This issue was placed before a jury, who gave their verdict for the plaintiff; after a fruitless attempt to set it aside, the defendant took this appeal.

On the trial, plaintiff's counsel called on defendant to produce a bill of the prices agreed on between them for the work to be performed, and at the same time offered witnesses to prove the value, not only of those items in his account, which were mentioned in the bill of prices, but also of several other charges for extra work. This was objected to by defendant's counsel, on the ground that the bill of prices being proved to be a contract, the plaintiff, on a *quantum meruit*, could not offer evidence of, or recover the value of the work. The court overruled this objection, and the defendant calls our attention to his bill of exceptions to that opinion. We think that the judge decided correctly. The bill of exceptions assumes that this action is entirely one on a *quantum meruit*; such is not the fact. The plaintiff can be considered as claiming on a *quantum meruit* only for the extra work, not mentioned in the bill of prices. As to all the other items of his account, he claims these prices which, he avers, the defendant assumed and promised to pay. It has frequently been decided by this court, that an agreement for the price of services does not preclude proof of their value. 4

Louisiana Reports, 115, *Gourjon vs. Cucullu*; 4 *Martin, N. S.*, 178, *Boyd vs. Howard*; 8 *Martin*, 402, *Gilly vs. Henry*. But defendant contends that this bill of prices being a contract, must be adhered to, and that plaintiff can make no extra charge. It undoubtedly is a contract so far as it goes;

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Where the plaintiff sues to recover the value of work and labor done for the defendant, according to a bill of prices agreed on for part of it, and for extra work, he will be allowed to produce testimony of the value of all the work performed.

In an action on a special agreement for the price of work, or services rendered, the party may introduce proof of the value also.

EASTERN DIST. it is a naked enumeration of the prices of work to be done, **February, 1840.** the prices to be paid for each item, and shows a total sum of one thousand five hundred and twenty-six dollars twenty-four cents, for all the works therein detailed. Defendant's witnesses, when speaking of the contract entered into by the plaintiff, all refer to the bill of prices as showing the extent of his engagement, but none of them pretended that he was bound to do any thing not specified in it. No mention is made in that paper of the several items of extra works set forth in plaintiff's account, and among them is a large and important one, to wit: the building and putting up of a press. These additional prices of work were received by defendant, and could not have been executed had he not furnished the material; they must, therefore, be considered as done by his order. 4 *Louisiana Reports*, 101, *Andrews vs. Jacobs*; *Louisiana Code*, 2735.

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From the testimony in the record, as to the manner in which the whole work was executed, we have derived the impression that it was well done, with the exception of a few defects, to remedy which, the defendant has had to expend one hundred and fifty dollars. This deduction, we think, should have been allowed, together with a sum of fifty-six dollars, which is an overcharge in plaintiff's account. Fifty-six squares of joist are set down at three dollars per square, when the bill of prices authorized only a charge of two dollars per square. As to the delay defendant complains of, the evidence shows that no particular time had been fixed; and moreover, that the defendant has in some measure been himself the cause of the delay, by interrupting plaintiff and taking him off to work on a dwelling house of his during four months.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and that the plaintiff do recover of defendant thirteen hundred and fourteen dollars and seventy-four cents with costs below, and that the plaintiff and appellee pay the costs of this appeal.

COLLINGS vs. HAMILTON.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF WEST FELICIANA, JUDGE DAWSON, PARISH JUDGE, PRESIDING.

COLLINGS
vs.
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A verdict "for the plaintiff," without specifying any sum, is defective and illegal, when the suit is for a money demand, and will be set aside.

The Supreme Court, on setting aside the verdict of a jury, will render final judgment in the case if the evidence and facts in the record enable it to do so.

This is an action on an account for work and labor done on the defendant's house, in which the plaintiff claims a balance of one thousand and forty-two dollars, according to an account annexed.

The plaintiff alleges that, at the instance of the defendant, he undertook to work on a dwelling-house already begun, and that he employed men to assist him, whose joint labor and work is worth the sum of one thousand two hundred and seventy-seven dollars, on which two hundred and twenty-five dollars have been paid, leaving the balance claimed as yet due, and for which he prays judgment.

The defendant admits the work was done on his house, but not in a skillful and workmanlike manner; and further avers, that he was to pay for the value of the work done by the plaintiff, and be allowed the value of the labor of four negro carpenters belonging to him, who worked on the building at the same time, and whose labor is worth two dollars per day each. He concludes by praying that all credits for the services of his slaves be given, and that the work done on the building be adjudged not worth half the sum claimed.

On these pleadings and issues, the cause was tried before the court and a jury; the parish judge presiding in the place of the district judge, who had been of counsel in the cause.

There was a mass of testimony taken on the trial, touching the manner of doing the work, its value, and the work performed by the defendant's slaves. Upon all the evidence adduced, the jury returned the following verdict: "We, the

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jury, find a verdict for the plaintiff." After an unsuccessful attempt to obtain a new trial, on the part of the defendant, judgment was rendered confirming the verdict, and giving the plaintiff the sum claimed in his petition. The defendant appealed.

Turner, for the plaintiff.

Lobdell, contra.

Morphy, J., delivered the opinion of the court.

The plaintiff sues to recover one thousand and forty-two dollars, the value of work and labor done on a dwelling-house erected for defendant. The defence is, that the work is executed defectively, unskillfully, and in violation of defendant's instructions; that, by reason thereof, plaintiff is not entitled to one half of the amount claimed; defendant, moreover, claims the wages of four negro carpenters that he placed under the order and control of plaintiff, while he was working on said building.

A verdict "for the plaintiff," without specifying any sum, is defective and illegal when the suit is for a money demand, and will be set aside.

The plaintiff obtained a verdict. Having failed in an effort to set it aside, the defendant appealed.

The Supreme Court, on setting aside the verdict of a jury, will render final judgment in the case, if the evidence and facts in the record enable it to do so.

Our attention has been called to the verdict as being defective and illegal, in not specifying the amount found by the jury as required by article 522, of the Code of Practice. We think the verdict incorrect; it must, therefore, be set aside, together with the judgment rendered on it.

The Code of Practice, article 905, imposes on us the duty, when we reverse the judgment of an inferior court, to pronounce in the case such judgment as that court should have rendered, if the facts and evidence in the record can enable us to do so. Here we have before us all the testimony which induced the jury to find for the plaintiff. In controversies of this kind, it can hardly be expected that the evidence will be full, explicit, and free from any doubt. It consists entirely of the testimony of workmen and undertakers, who will differ in their opinions of the work they are called upon to examine; some have found plaintiff's

work well executed, others have found fault with it. The testimony shows that plaintiff informed defendant that he did not profess to be a first rate house carpenter, and that defendant expressed himself willing, nevertheless, to employ him, intending to have his house roughly finished. From a careful examination of the whole evidence, we think, with the jury, that it strongly preponderates in favor of the plaintiff. His account is proved with some certainty, while the facts set up in defence are sustained by vague and contradictory testimony. As to defendant's claim for wages, the evidence does not show how long his negroes worked with the plaintiff, or that they were all carpenters, as alleged. One of them is represented to be a rough carpenter; the others were field hands. They gave some occasional assistance to the plaintiff, but it does not appear that any wages were stipulated. Had this claim been for a stipulated price for the whole building, the defendant would perhaps be entitled to something for the time of his negroes; but in his account, the plaintiff only claims his own wages, and that of the workmen in his employ. If we were to allow the defendant's claim, he would be receiving the wages of his negroes after having had the benefit of their labor.

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It is, therefore, ordered, adjudged and decreed, that the judgment be reversed and the verdict set aside; and it is further ordered and decreed, that the plaintiff do recover from the defendant the sum of one thousand and forty-two dollars, the costs in the court below to be paid by defendant, the plaintiff and appellee paying those of the appeal.

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ARMOR vs. HUIE.

ARMOR
vs.
HUIE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action for the return of the price, on account of redhibitory defects in a slave, although the demand exceeds five hundred dollars, it may be proved by a single witness, when the claim grows out of a contract evidenced by a notarial act.

This is a redhibitory action to recover fifteen hundred dollars, the alleged value of a slave, sold by the defendant to the plaintiff, and soon after died of a disease supposed to have existed at the time of sale.

The defendant controverted this fact, and the testimony of the physician, to whose hospital the slave was sent, and soon afterwards died, was received as evidence of it. The act of sale was also adduced in evidence. The parish judge rendered judgment for the plaintiff, and the defendant appealed.

L. Peirce, for the plaintiff.

Sterrett, contra.

Morphy, J., delivered the opinion of the court.

The defendant appeals from a judgment decreeing him to pay back to plaintiff fifteen hundred dollars, the price of a slave he had sold to the latter, and who died of a pulmonary complaint shortly after the sale. The fact of the existence of the malady, at the time of the sale, is satisfactorily proven by the physician who attended the slave, during his last illness. This evidence cannot be outweighed by the opinions of any number of witnesses as to the healthful appearance of the negro, during several years before that time; but even those witnesses show that the boy was subject to an indisposition, which they denominate *a slight sensation*. It might have been the first seeds or workings of the very disease, declared by the physician to have been the cause of his death.

A point made by appellant's counsel is, that plaintiff's claim being over five hundred dollars, the testimony of a single witness was insufficient, and he relies on article 2257, of the Louisiana Code. This provision is altogether inapplicable to the present case. The agreement out of which plaintiff's claim grows is evidenced by a notarial act; as to the facts which may entitle him to a recovery under it, no law requires that they should be made out by more than one witness, unless the counsel seriously have intended to revive the old maxim, *testis unus, testis nullis*.

It is, therefore, ordered and adjudged, that the judgment below be affirmed, with costs.

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In an action for the return of the price, on account of redhibitory defects in a slave, although the demand exceeds five hundred dollars, it may be proved by a single witness, when the claim grows out of a contract evidenced by a notarial act.

WORSLEY VS. BARRETT ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where the defence set up is entirely disproved by the plaintiff, and the defendant appeals, he will be condemned to pay damages as for a frivolous appeal.

But where the debt carried ten per cent. interest, only five per cent. damages were decreed.

This is an action against the endorsers of a promissory note. The endorsements sued on were in blank, but the plaintiff made a special endorsement below to one Wm. Brand. On the trial, Brand was offered as a witness to show that this endorsement was made to him merely for the purpose of collection; that the plaintiff was the true owner; and the defendants promised to pay the note. This testimony was excepted to, on the ground that, by an inspection of the note sued on, the plaintiff had parted with his interest therein.

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VS.
HOFF.**

Caswell, for the plaintiff.

Sterrett, contra.

Morphy, J., delivered the opinion of the court.

The defendants are sued as endorsers of a promissory note. The defence was, that the plaintiff could not recover on the note, having parted with his interest therein, by a special endorsement of it to one Wm. Brand. The latter appeared as a witness, and testified that he was only an agent for the collection of the note, which was the property of plaintiff; that, since its maturity, the defendants have repeatedly promised to pay this debt to the plaintiff. The appellee has prayed for damages; we think that he is entitled to them; but as the note already bears ten per cent. per annum interest, we shall grant only five per cent. in damages on the amount of the debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs, and five per cent. damages.

BURTON VS. HOFF.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, FOR THE PARISH
OF ST. HELENA, THE JUDGE THEREOF PRESIDING.

The verdict of a jury on mere matters of fact, brought out by the answers of the parties to interrogatories propounded to each other, will not be disturbed without good grounds.

This is an action on a promissory note of the defendant, and an account for moneys laid out and advanced for his

use, amounting to the aggregate sum of three hundred and ninety-two dollars, for which the plaintiff prays judgment. EASTERN DIST.
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The defendant admitted his signature to the note, but denied the other allegations, and set up two accounts against the plaintiff for the sum of eight hundred and fifty dollars, in compensation and reconvention.

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Interrogatories were propounded to both parties, which brought out answers explaining the respective demands as each of the parties understood them.

The whole was submitted to a jury well acquainted with the respective parties, who returned a verdict for the plaintiff's demand, and rejecting that of the defendant. From judgment confirming this verdict the defendant appealed.

Davidson, for the appellant.

Morphy, J., delivered the opinion of the court.

Plaintiff seeks to recover three hundred and ninety-two dollars and sixty cents, being the aggregate amount of defendant's note of hand to his order, and of moneys advanced for account of defendant. The latter admitted his signature, pleaded compensation and reconvened in a sum of eight hundred and fifty dollars, which he averred to be due to him upon a full settlement of his accounts with plaintiff. The verdict of the jury called upon to try this issue was in favor of plaintiff; and defendant, without any attempt to set it aside, has taken this appeal.

The evidence mainly consists of the answers of both parties to interrogatories they have put to each other. They relate to a series of transactions and arrangements which took place between them. A careful perusal of the whole evidence has not enabled us to perceive any thing which makes it our duty to disturb the finding of a jury, who were acquainted with the parties thus made witnesses in their own cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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M'DONOUGH
vs.
FOST, F. M. C.

M'DONOUGH vs. FOST, F. M. C.

ON AN APPLICATION FOR A MANDAMUS.

An appeal lies directly from an order of seizure and sale.

This is an application for a *mandamus* to the district judge of the first judicial district, commanding him to grant an appeal from an order of seizure and sale.

Hennen, for the application, showed, that on his presenting a petition of appeal on the part of the defendant in this case, the judge *a quo* refused to grant said appeal.

Strawbridge contra, submitted the case to the court

Martin, J., delivered the opinion of the court.

This is an application for a *mandamus* to the judge of the first judicial district, to grant to the defendant an appeal from his order at chambers, for the issue of a writ of seizure and sale. The sole question before us is, whether the defendant is entitled to such appeal.

As early as the year 1823, in the case of *Tilghman vs. Dias*, 12 *Martin*, 691, we held that an order of seizure and sale was a judgment. Afterwards, in the case of *Gurlie et al. vs. Coquet*, 3 *Martin, N. S.*, 498, this principle was recognized, and we added that such a judgment was final in its nature, and that an appeal lies therefrom. We have acted on such appeals in the cases of *Moss vs. Byrnes*, 12 *Louisiana Reports*, 615, and *Armstrong vs. Levy et al*, 14 *Idem*, 157. The *mandamus* must therefore be issued.

WATKINSON, AGENT, &C., vs. BLACK.

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February, 1840.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF WEST FELICIANA, THE JUDGE THEREOF PRESIDING.WATKINSON,
AGENT, &C.
vs.
BLACK.

An affidavit in which the plaintiff states "*he verily fears, and has good and sufficient cause to believe, the defendant will remove the slaves out of the state, &c.,*" is insufficient to support a writ of sequestration.

The plaintiff sues, as agent of one Lewis Jordan, of Tennessee, and charges the defendant with having illegally taken from the state of Tennessee, and out of the legal possession of the plaintiff, several slaves, and which he has brought to the parish of West Feliciana. He alleges, that the defendant is a transient person, without any known domicil, and that he has good reason to fear, and verily believes, that he will remove the said slaves from the state of Louisiana, so that the said Jordan will be forever deprived of his rights: Wherefore he prays that they be sequestered, &c. The plaintiff declares, in his affidavit, at the foot of the petition, "*that he verily fears, and has good and sufficient cause to believe, that the defendant will remove said slaves out of the state of Louisiana.*"

The defendant moved to set aside the sequestration, on the following grounds:

1. The plaintiff sues as agent, and has not produced any authority to show he is authorized to act in that character.
2. There is no sufficient and legal cause sworn to in the affidavit to authorize a sequestration.
3. The affidavit is insufficient in not stating that the defendant was about to remove the slaves out of the state, or jurisdiction of the court.
4. There is not any legal bond given, &c.

The defendant also excepted to the petition, and averred, that the action could not be maintained on various grounds.

The district judge set aside the writ of sequestration, on the first, second and third grounds, relied on in the defendant's written motion. The plaintiff appealed.

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Patterson, for the defendant and appellant, suggested to the court that the record had not been filed by the appellant; and that he now offered to file it, (three judicial days since the return day having elapsed,) and prayed that the judgment be affirmed, with damages and costs.

Morphy, J., delivered the opinion of the court.

Plaintiff appeals from a judgment dissolving an order of sequestration, previously granted him, as agent of one Lewis Jordan. The property sequestered consisted of certain slaves in the possession of the defendant. Since this appeal was taken, the plaintiff's petition has been dismissed, from which judgment no appeal has been asked. The suit itself having been dismissed, the sequestration, which is only an accessory proceeding, must have already shared the same fate. The appellee, however, who has brought up the record, asks us to confirm the judgment setting it aside. To this we think he is entitled, and shall rest our affirmance only on one of the grounds assigned by the judge *a quo*, to wit: the insufficiency of the affidavit, which does not set forth any fear that the defendant, Black, may remove the slaves out of the jurisdiction of the court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BURTON'S HEIRS VS. BURTON ET AL.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. HELENA.

Every donation or advantage is liable to be collated among co-heirs, unless expressly exempted by the donor.

So, in an action of partition among co-heirs, slaves which have been given, the donee is not permitted to collate them in kind, but according to their value at the time of the donation.

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The donation of slaves imports an absolute transfer of property ; and they are at the donee's risk, who is entitled to all the profits and increase, and must bear their deterioration and loss.

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This is an action of partition, instituted by three of the children and forced heirs of Nancy and Jacob Burton, deceased, against three co-heirs and the representatives of a co-heir, Nathaniel Burton, deceased.

The plaintiffs allege, that the succession of their deceased ancestor is worth about ten thousand dollars, and has never been partitioned among the co-heirs. They pray for a final partition of said succession, according to law.

The representatives of Nathaniel Burton, by attorney, answered, and by way of intervention, alleged, that the other heirs had received large amounts of property in the life time of said Jacob and Nancy Burton, both in Georgia and this state, which they were bound to return to the succession, or collate it according to law. They further show that the succession of Jacob Burton was opened in the parish of St. Helena, and that John Burton was appointed administrator, who has illegally caused the property thereof to be sold. They further state their desire for a partition, and for this purpose require the administrator to settle his account ; the heirs made to collate, and that a partition take place according to law.

They further state, that they are ignorant how much property has been received by the other heirs, but enumerate some and propound interrogatories to several of the heirs touching property "received from their common ancestor, and pray that it be inventoried as part of the succession."

After the heirs had answered, and all the property accounted for, the succession amounted to the gross sum of fifteen thousand six hundred and thirty-six dollars, and the debts unpaid and due, amounted to eight thousand three hundred and ninety-eight dollars, which, deducted, leaves a balance of seven thousand two hundred and thirty-eight dollars, to be divided among seven sets of heirs. Each heir collated, whether the property received from the ancestor in

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his life time, was "given off" in Georgia, where he formerly resided, or in Louisiana, where his succession was opened.

The heirs collated what property they had received at its appraised value; those of Nathaniel Burton, deceased, were allowed the price of hire of two slaves "given off" to him in Georgia, and taken back by said Jacob Burton fourteen years previously, and which was deducted from the gross amount of the succession before partition. Upon this basis the partition proceeded.

Two of the heirs, plaintiffs, and the attorney for the absent heirs, opposed the homologation of the petition, alleging that a tract of land and some notes remained to be divided, and, therefore, the partition was only provisional. They oppose the allowance of three thousand and thirty-four dollars to the heirs of N. Burton, for the hire of slaves loaned to, and taken back by the ancestor: Finally, that the partition is made on illegal principles, and that the shares of each are incorrect.

The heirs of N. Burton opposed the partition, on the ground that the heirs who had received slaves, did not return them and their increase to the mass of the succession, and because the hire or value of their services were not collated: Finally, because the value of the two slaves loaned or "given off" to N. Burton and taken back, were not allowed.

These oppositions were overruled, and from judgment homologating the partition, the opponents appealed.

Andrews and Lawson, for N. Burton's heirs contended,

1. That the judge of probates erred in not deciding that all the property of Jacob Burton, given off or loaned to his children and heirs, should be returned in kind with all the natural increase, whether said loans were made in the state of Georgia, or in Louisiana, inasmuch as no titles were given, and as the law recognizes no principle but equality as the basis of all partitions.

2. And further they contend, that, if the court below was right in considering the giving off, or loans of property, as absolute donations, then the court erred in not allowing to

the heirs of Nathaniel Burton the price of the two slaves, which their grand-father had loaned to their father, and afterwards took back and sold.

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3. That the court below erred in not decreeing that all heirs of Jacob Burton should account for the use of the property loaned up to the time of making the partition, and in such manner as to produce perfect equality at the time of partition, among all the heirs.

Bullard, J., delivered the opinion of the court.

This is an action of partition among the heirs of Jacob Burton and his wife, and the only difficulty consists in adjusting the collations among the heirs.

It is necessary to premise, that the deceased removed, some years since, from Georgia, where they had "given off," as it is termed, to their children, as they settled in the world, certain portions of property, such as slaves, small tracts of land, or household furniture or stock; and that, after they removed to Louisiana, the same thing had been done towards other children. The court below considered such advances as donations subject to collation by taking less out of the estate, and charged the co-heirs with the slaves thus received, according to their value, at the time of the advancement; and, consequently, gave the increase or young of the slaves to them respectively. The representatives of Nathaniel Burton, one of the sons of the deceased, who had received two slaves in his life time, but which had been taken back at his death, complain of this as producing great inequality in the condition of the co-heirs, and have appealed to this court. Their counsel have relied on three points:

1st. That the court erred in not deciding that all the property of Jacob Burton, the father, given off or loaned to his children, should be returned in kind with its natural increase, whether such loans were made in Georgia or in Louisiana, inasmuch as no titles were given, and the law recognizes equality among co-heirs as the basis of all partitions.

2d. That if the court was right in regarding the giving off or loans, as absolute donations, then there was error in not

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allowing to the heirs of Nathaniel Burton, the price of two slaves which had been loaned to their father, and afterwards taken back.

3d. That the court erred in not decreeing that the heirs should account for the use of the property loaned to them up to the time of the partition.

I. The record does not show what is the law of Georgia, in relation to such advances to children; whether they are regarded as absolute donations, not subject to be accounted for in the settlement of the estate of the donor; or whether they be merely in the nature of loans. One witness testifies, that the custom was various on that subject; that sometimes the parents gave to their children slaves as they married off, by way of gift, and sometimes as a loan. And if the young people got into a difficulty, or died, the old people claimed the property. In the absence of proof to the contrary, the law of

Every donation or advantage is liable to be collated among co-heirs, unless expressly exempted by the donor.

Georgia must be taken to be consonant to ours, and, consequently, that every donation or advantage is liable to be collated, unless expressly exempted by the donor. If these advances were exempted as loans in the particular case before the court, there would be an end of the controversy, for the slaves would never have ceased to belong to the ancestor, and, consequently, would still belong to the estate, together with their increase. But the co-heirs to whom slaves were

So, in an action of partition among co-heirs, slaves which have been given, the donee is not permitted to collate them in kind, but according to their value at the time of the donation.

given, were interrogated on facts and articles touching those advances, and they answer, on oath, that they received the slaves as a gift. We must, therefore, consider the slaves as having been the object of a donation and subject to collation, according to the laws of Louisiana. "When slaves have been given, says the Code, the donee is not permitted to collate them in kind. He is bound to collate for them by taking less, according to the value of the slaves at the time of the donation." *Article 1361.* The next article draws the necessary conclusion, to wit: that the donation imparts an absolute transfer, that the slaves are at the risk of the donee, and that he profits by their increase, as he would suffer by their deterioration or loss.

The donation of slaves imports an absolute transfer of property, and they are at the donee's risk, who is entitled to all the profits and increase, and must bear their deterioration and loss.

II. But the appellants complain that the heirs of Nathaniel

Burton ought to have been allowed the price of two slaves loaned to their father, and taken back. To this, it appears to us a satisfactory answer, to say, that they have been compelled to collate nothing on account of those two slaves, and that having been restored to the father before his death, we are to suppose they were either otherwise disposed of, or formed a part of his succession. In the latter event, they have, by this partition, received them in money, or, in other words, their share in the estate has not been diminished on account of those two slaves.

III. Lastly, the complaint of the heirs of Nathaniel Burton, that their co-heirs were not decreed to account for the use of the slaves loaned to them, up to the time of the partition, appears to us unfounded. The slaves were at the risk of the children to whom they were given. If they had died the day after the donation, they would, nevertheless, have been compelled to collate their estimated value. It would, therefore, be manifestly unjust that they should be decreed to pay hire for them. Indeed, as soon as it is settled that there was no loan, but a donation, there is no longer any question about the hire, for the donee became liable to collate only value of the slaves.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

WILCOX ET AL. vs. HALDERMAN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

In an action to render the captain and owners of a steam-boat liable in damages for the value of sundry bags of corn shipped on board and delivered in a damaged state, evidence will not be received to show that the corn was purchased from the captain in order to make him liable as seller.

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This is an action in which the plaintiffs allege, the defendants are indebted to them in the sum of four hundred and fifty-four dollars in damages, being the value of one hundred and sixty bags of corn, shipped in good order on board the steam-boat Arkansas, commanded by the defendant, Halderman, and delivered at the port of destination in a totally damaged state. They pray judgment against the captain and owners of said boat for the amount of their said demand.

The defendants pleaded a general denial. On the trial, the plaintiffs' counsel offered a witness to prove that the corn was purchased from the captain, and that he represented it to be of first rate quality, to all of which testimony the defendants' counsel objected, on the ground that it was inadmissible under the pleadings, inasmuch as the suit was instituted for a breach of contract of affreightment. The court overruled the objections and admitted the testimony, and the defendants excepted.

The district judge summed up the case, and rendered judgment as follows:

"This is a suit for damages sustained by a deterioration of goods shipped on the steamer Arkansas, on freight. The bill of lading is in the usual form. The object of the contract of affreightment was corn in sacks. The sacks were in good order at the time of the shipment, and are proved by plaintiffs' witness, the consignee, to have been delivered in like good order. When examined and used, however, after delivery, the corn was found to be damaged or spoiled from internal decay; at least it is supposed that was the cause of the damage, as the evidence does not attempt to explain the deterioration in any other manner, and as the packages or sacks are proved to have arrived in good order.

"Deterioration of the cargo from internal decay, perils of the sea, (or river,) or *vis major*, are not warranted against by the ship owner, and do not diminish or destroy his claim for freight. See 3 *Kent's Commentaries*.

"The witness, Collins, who purchased the corn for plaintiffs, proves that it was of first rate quality when the contract of affreightment was made, and that the corn received by

the consignee could not have been the corn that plaintiffs shipped. EASTERN DIST.
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"If there was any change of the merchandize on the route, this would have been clearly a fraud and barratry on the part of the agents of the owners of the vessel, for which the defendants would have been liable. But the testimony of several witnesses negatives this fact, which, indeed, has nothing to support it but the opinion, (however decided and sincere,) of the witness, Collins.

"It is, therefore, adjudged and decreed, that there be judgment in favor of the defendants, with costs."

The plaintiffs appealed.

Josephs, for the appellants, contended, that the evidence of Collins showed the corn was purchased on the representations of the captain that it was of first rate quality, and for which he gave a bill of lading, that it was shipped in good order.

2. The position occupied by the defendant, Halderman, removes this case from the general operation of the law cited by the district judge. He cannot pretend ignorance as to the quality or condition of the corn, because it was *in his possession* long before it became the property of the *present* plaintiffs; and was purchased by their agent upon *his assurance* of its excellence, immediately after which assurance he signed the bill of lading sued on. If any deception was practised upon the plaintiffs, he is proved to have been the author of it.

Benjamin, and *T. Slidell*, for the defendants, insisted that the case turned mainly on questions of fact decided by the district judge, and his judgment should not be reversed unless manifestly erroneous.

2. The ship owner is not responsible for injury arising from the natural deterioration of the article shipped. 3 *Kent's Commentaries*, article on *Shipping*.

3. The corn was delivered in the same order in which it was shipped. From its external appearance it was in good order, both when shipped and delivered.

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4. The consignee accepted the corn after examination, and without objection. This barred all recovery, if any right ever existed. 12 *East*, 381; 4 *Campbell*, 119.

Bullard, J., delivered the opinion of the court.

This is an action against the captain and owners of the steamboat *Arkansas*, to recover the value of one hundred and sixty bags of corn, which were shipped in good order on board said boat, but delivered at the place of destination damaged, and totally unfit for use.

It appears by a bill of exceptions, to which our attention has been called, that the plaintiffs produced the testimony of a witness to prove that the corn shipped on board the boat was purchased from the captain, one of the defendants; and that he represented it to be of first rate quality. This evidence was objected to as inadmissible under the pleadings, the suit being for a breach of a contract of affreightment, upon which alone issue was joined. The evidence was, however, admitted. This bill of exceptions was taken by the defendant, and, therefore, needs no further notice, but we think that so far as the evidence offered tended to make one of the defendants liable as vendor, it was inadmissible under the pleadings.

In an action to render the captain and owners of a steamboat liable in damages for the value of sundry bags of corn shipped on board and delivered in a damaged state, evidence will not be received to show that the corn was purchased from the captain in order to make him liable as seller.

Whether the corn was injured during the short time it was on board, or whether its deterioration was attributable to internal decay, and from causes existing previously to the shipment, is a question of fact, which the court below decided in favor of the defendants, and we see no good reason why it should not be affirmed.

The judgment of the District Court is, therefore, affirmed, with costs.

VAIRIN ET AL. VS. PALMER.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

VAIRIN ET AL.
VS.
PALMER.

The plea of the general issue admits the signature of the maker of the note sued on. 800/297

When there is no defence, the judgment on appeal will be affirmed with the maximum of damages.

The defendant, Therese Palmer, is sued as maker of a promissory note, signed in her name by A. W. L. Palmer, as attorney in fact. She put in her plea of the general issue, by her attorney in fact, and there was a verdict and judgment against her, from which, by counsel, she appealed.

Jones, for the plaintiffs, urged the affirmance of the judgment, with ten per cent damages.

The case was submitted, and tried *ex parte*.

Martin, J., delivered the opinion of the court.

This is an action on a note of hand, to which the defendant pleaded the general issue. This plea admitted the signature of the maker of the note, and there was a verdict and judgment for the plaintiffs.

The defendant appealed. No counsel appeared in this court on the part of the appellant. The plaintiffs pray the affirmance of the judgment with damages, as for a frivolous appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

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M'GEHEE vs. M'CORD ET AL.

M'GEHEE
vs.
M'CORD ET AL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF WEST FELICIANA, JUDGE DAWSON, PARISH JUDGE, PRESIDING.

Service of citation on one partner of a particular partnership, is insufficient to bring all the partners into court.

Several persons associating themselves under a particular style and firm, for the purpose of constructing a rail road, although they draw bills of exchange in the mercantile form, will be considered as forming an ordinary or particular partnership.

Particular partnerships are joint, and the obligations of the firm bind the partners *jointly* only, who must be all sued together, and service of citation made on each and every partner.

The plaintiff alleges, he endorsed bills of exchange and notes drawn and signed by one I. M'Cord and others, who had associated themselves under the style and firm of "Isaac M'Cord & Co.," for the purpose of building the West Feliciana Rail Road, under an agreement made by notarial act, in which the defendants conveyed to him a steam saw-mill and lot of ground to indemnify him against loss. That on the 2d June, 1837, the previous liabilities which he had come under for said firm were liquidated, and a note given, signed by the members of said firm, which he endorsed and is liable to pay. He alleges, that all the members of the partnership are bound jointly and severally to indemnify him against said endorsement, and prays that they be cited, and that the steam saw-mill and lot of ground be sold to pay said note.

Service of citation and petition was made on John Cummings alone, who appeared by counsel and excepted; and also denied the right of the plaintiff to maintain his action, without citing all the other defendants in the suit; that the note sued on was a novation of the original debts or obligations, for which the mortgage or lien was given on the property described in the petition, and that said mortgage or lien, if it ever existed, was extinguished, &c.

On the trial of the cause, after hearing the evidence and arguments of counsel, the judge presiding was of opinion, the plaintiff failed to make out his case, and gave judgment of non-suit against him, from which he appealed.

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M^cGENEE
VS.
M^cCORD ET AL.

Turner, for the plaintiff and appellant, contended :

1. The note was the note of a firm, and was joint and several. The issuing of promissory notes and bills of exchange in their firm name, brought them under the law of merchants as relates to these transactions, even if they, in relation to the building of the rail road, were special partners.

2. Their contract of guaranty to the plaintiff, dated 11th January, 1837, brought them under the mercantile rules of dealing with him as a firm.

3. The note sued on was a firm note, being subscribed by a majority of the members of the firm. See their articles of co-partnership.

4. The admissions, in the answer of Cummings, are good proof against all the defendants, and may be considered as the answer of all; but if not, it is proof against the members of the firm.

5. The signatures to the note were fully proved, and the endorsement of the plaintiff upon it. The credit upon it shows that it was presented at the place of payment when due, and was demanded.

6. Every allegation of the petition is admitted except the lien upon the land, and even that, for there is an averment that the contract had been novated, and this admits it existed, and threw the burden upon defendants to show its extinguishment, and there is no such proof offered. It does not result by the payment of the original drafts and note.

7. The plaintiff was at all events entitled to judgment against John Cummings, who had answered and insists that the judgment of non-suit may be set aside, and judgment be rendered in favor of the plaintiff by this court for the balance of the note sued upon, and eight per cent. interest since the same became due, and for general relief adapted to the case, and the lot and mill sold to indemnify the plaintiff.

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Andrews, for the defendant, urged that this action could not be maintained, because there was no legal service on the persons sued. The partnership is not a commercial one, and but one of the partners is cited. The others reside out of the parish, and one is dead. Service of process should have been on all of them, or their representatives.

Morphy, J., delivered the opinion of the court.

The plaintiff appeals from a judgment of non-suit. He states that having consented to endorse bills of exchange and promissory notes for defendants to a considerable amount, he received of them, by notarial act, the transfer of a certain steam saw-mill and lot of ground; that said sale was thus passed to him for the purpose of securing and indemnifying him against any loss from such endorsements, and was intended to have the effect and operation of a mortgage; that under this agreement, his endorsements were given on their paper to the amount of twenty-four thousand and twelve dollars forty-four cents, which is now due, and for which he is liable towards the holders thereof. He prays for judgment against the defendants *in solido*, and for the sale of the property; and that the proceeds may be applied to the payment of said debt.

The opinion we have formed in relation to the service of the petition and citation in this case, renders unnecessary the examination of several questions which arose on the trial.

Service of citation on one partner of a particular partnership is insufficient to bring all the partners into court.

Several persons associating themselves under a particular style and firm, for the purpose of constructing a rail road, though they draw bills of exchange in the mercantile form, will be

The evidence shows that the firm sued here is composed of six individuals, one of whom only, to wit: John Cummings, was served with process of citation. This would have been sufficient had the firm been a commercial one; *Code of Practice, article 198*. But from the articles of co-partnership, it appears that these persons became associated and adopted a firm to carry on the business of constructing the West Feliciana Rail Road. This formed between them an ordinary and particular partnership. We think that service should have been made on each and every partner; but it is contended that the issuing of notes and bills of exchange in the name of their firm brought the partners under the operation

of the law merchant ; at least as to their transactions with plaintiff under the guarantee, even if in relation to the undertaking of the rail road, they must be considered as special partners. To this we cannot assent. It is the dealings and business of a partnership which make it a commercial one, not the form of the obligations they may contract. Engagements to pay a sum of money in this country are generally, if not always, thrown into that form. If that alone was sufficient to stamp a mercantile character on a partnership, there would hardly exist any other here than commercial partnerships ; as to their adopting a firm, it was a matter of convenience, but did not change the nature of their association. 5 *Martin*, 682, *Slocum vs. Sibley*. We are asked to give judgment at least against Cummings, who has been cited and has answered ; but even this, we cannot do ; the liability is joint, not joint and several. All the obligors should have been made parties to the suit ; no judgment can be rendered against any ; *Louisiana Code*, article 2080.

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considered as forming an ordinary or particular partnership.

Particular partnerships are joint, and the obligations of the firm bind the partners jointly only, who must be all sued together, and service of citation made on each and every partner.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

QUARTREVEAUX vs. CABOCHE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action of slander, for calling the plaintiff "*a thief*," &c. the defendant cannot offer the declarations of the plaintiff's father in evidence, reproaching the son with having committed a crime.

The declarations of the father, reproaching his son with misconduct cannot be given in evidence against him in an action against a third person for slander. Nothing the father may have said can assist the defendant in establishing his charge. It is hearsay evidence, and the father could not be heard if he were offered as a witness.

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QUANTREVEAUX

VS.

CAROCHE.

Where damages are complained of as excessive, the assessment of them are considered so peculiarly the province of the jury, that the verdict will not be disturbed, without evident grounds.

This is an action of slander in which the plaintiff alleges, the defendant, with the malicious intention to defame and slander him, falsely, maliciously and publicly stated on the 11th February, 1838, and at several other times, that he (meaning petitioner,) was "a thief, and had stolen a watch and books." He lays his damages at ten thousand dollars, and prays for a trial by jury.

The defendant pleaded the general issue, and set up various matters in justification of his charges, by way of defence.

On the trial, the plaintiff proved the slanderous charges, and the defendant attempted to sustain his defence. The material questions of law raised in the trial are stated in the following opinion made by this court.

The cause was submitted to a jury, who returned a verdict of fifteen hundred dollars in damages for the plaintiff. From judgment rendered thereon the defendant appealed.

Roselius, for the plaintiff.

Canon, for the defendant.

Martin, J., delivered the opinion of the court.

This is an action of slander and assault and battery. The general issue and justification are pleaded. There was a verdict and judgment against the defendant, and he appealed.

Our attention has been drawn to several bills of exception taken by the defendant's counsel on the trial.

1. To the refusal of the judge to permit the defendant to ask a witness, "if he had not heard the plaintiff's father reproach him for compelling them to leave France on account of some crime he (the plaintiff) had committed."

2. In refusing to admit proof that the plaintiff's father had said, "that he was glad the witness lived near him, as he feared his son (meaning plaintiff) would make an attempt on his life."

3. And to the refusal of the judge to instruct the jury and the counsel of the plaintiff, that the latter, in his closing argument, ought to confine himself to the testimony, because defendant's counsel had no means of reply.

It does not appear to us that the court erred. The words charged in the petition, as spoken by the defendant, are, that the plaintiff was "a thief, and had stolen a watch and books." Nothing that the plaintiff's father may have said, can assist the defendant in establishing the charge which he made against the plaintiff. It is but hearsay evidence; and the person whose declarations were offered to be proved, could not be heard as a witness against his son. As to the third bill of exception, it is not the duty of the court to inform the jury of the manner in which the counsel is to proceed. A party may, indeed, require a proper charge from the court to the jury, and except to his refusal. But we do not know that a bill of exception lies to the refusal of the court to tell the counsel that he must confine himself in his argument to the testimony, as the defendant's counsel had no means of reply. We presume that the court will always restrain the counsel if he attempts to travel out of the testimony.

On the merits, it does not appear to us that the verdict ought to be disturbed. The refusal of the judge to grant a new trial, is evidence to us that he was satisfied with the decision of the jury.

The damages have been complained of as excessive; but the assessment of them is the peculiar province of the jury, and the case does not seem to require our interference in this respect.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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In an action of slander, for calling the plaintiff "a thief," &c., the defendant cannot offer the declarations of the plaintiff's father in evidence, reproaching the son with having committed a crime.

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NOTT ET AL.
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APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

It is necessary to allege and prove the endorsement by the payee of a draft, in order to entitle the holder to recover.

Whatever might have been cured by evidence or admission in the court below, cannot be assigned as error apparent on the record.

When the certificate to the record shows that it contains all the evidence adduced on the trial, the appellant may at any time call the attention of this court to any error on the face of the record; or try the case on the merits without any assignment at all.

This is an action against Brander, M'Kenna & Wright as acceptors of a bill of exchange, made payable to the order of Wm. M. Gwinn, whose name is endorsed thereon in blank. The plaintiff alleges that M. V. King & S. Nelson, at Tchula, Mississippi, the 15th June, 1836, drew their bill of exchange on the defendants, payable thirteen months after date to the order of W. M. Gwinn, who accepted to pay the same. That they did not at maturity pay it, which was protested; as by said bill and protest, *hereto annexed*, more fully appears. The defendants pleaded a general denial. The case was tried *ex parte*. The bill and protest was offered in evidence, upon which judgment for the plaintiffs was rendered for the amount of the bill sued on, with interest and damages.

The defendants appealed.

T. Slidell, for the appellants, assigned for error apparent on the face of the record, the following points:

1. That this cause was tried in the absence of defendants, or their counsel, without due notice, and without due setting for trial.
2. That the petition shows no ground of action, there being no allegation of an endorsement by the payee of the draft whereon suit is brought.
3. That the judgment was rendered without evidence, or if any, upon no other than the naked copy of protest, and

production of the bill, without proof of the signatures of the payee thereof.

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4. That even could this court suppose, in contradiction of the record, that said payee's endorsement was proved, yet such proof was inadmissible, and could not have been legally received under the allegations of the petition, and in the absence of defendants or their counsel, who in no way assented to such admission of testimony, if such testimony were given, which they deny.

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5. That defendants have been adjudged to pay costs of protest without proof thereof, or of the payment thereof by plaintiffs, and for an amount manifestly illegal.

6. That a judgment hath been rendered inconsistent with the prayer of the petition in favor of Wm. Nott & Co., a firm which, on the face of the petition had plainly ceased to exist; and who, in the judgment are stated as the plaintiffs, but who are not, in truth, the plaintiffs in the cause.

7. And now, in addition to the foregoing assignment, the defendants say that said judgment is contrary to law; hath been rendered without any sufficient or lawful evidence, and should be reversed, and a judgment for the defendants, or else of non-suit, entered.

Strawbridge, for the plaintiffs and appellees, insisted that the appellants could not maintain this appeal. That nothing could be assigned as error which might have been cured by legal evidence or admissions made in the court below.

2. The appeal should be dismissed, the errors being assigned too late. The appeal was filed the 9th July, and the assignment of errors on the 12th November following.

Morphy, J., delivered the opinion of the court.

The defendants are sued on their acceptance of a draft payable to the order of W. M. Gwinn. The answer is a general denial. The case was tried below *ex parte*, and decided in favor of plaintiffs. After a fruitless attempt to obtain a new trial, defendants appealed.

In this court they have assigned various errors apparent

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on the face of the record. Of these, it will be material to notice only two, to wit :

1st. That the petition shows no ground of action, there being no allegation of an endorsement by the payee of the draft.

2d. That no proof of such endorsement has been made in the inferior court.

It is necessary to allege and prove the endorsement by the payee of a draft, in order to entitle the holder to recover.

I. This allegation was a most essential one, to show title in the plaintiffs. Their counsel has contended, that the bill and protest having been annexed to the petition, defendants should be considered as having had sufficient notice of the endorsement, by which plaintiffs became holders. He has referred us to a series of decisions in this court. In most of them, we find it laid down, that when a paper is prayed to be made a part of the petition, it cures or corrects any variance between them, and may even convey notice of facts omitted in the petition. Here the bill and protest were not made a part of, but only annexed to the petition. This circumstance might not produce the same effects ; but whether it does or not, it is unnecessary to decide in this case, because, admitting that it did convey notice of the endorsement, the appellants assign next :

Whatever might have been cured by evidence, or admission in the court below, cannot be assigned as error apparent on the record.

II. That even, if admissible under the pleadings, no proof of the transfer was made on the trial. To this assignment it is objected, that whatever might have been cured by evidence or admissions below, cannot be assigned as error apparent on the record, and we are referred to the case of *Caldwell vs. Townsend*, 6 *Martin, N. S.*, 640. This decision is not the only one on this point ; it had been preceded by many others, upholding the same doctrine ; but an attentive perusal of them will show, that they all relate to cases where the imperfect state of the record could not enable the court to say that such evidence had not been adduced, nor such admissions made. In the case now under consideration, we have the certificate of the clerk, that the record contains a copy of all the *proceedings, as well as of all the documents filed, and all the testimony adduced on the trial of the cause.* With such a full and complete transcript before us,

the appellants might well, at any time, have called our attention to any error on the face of the record. They might even have safely tried their case on its merits, without making any assignment at all. The record shows, that the endorsement by the payee to the plaintiffs has not been proved; without such proof, the judge *a quo* erred in permitting them to recover.

But the counsel for appellees has pressed upon us that a promise to pay, after maturity, is an admission of acceptance, and of the other party's hand-writing; and that, in like manner, an offer to give another bill in lieu of one already due, is an admission of the holder's title, so as to supersede the necessity of proving the endorsements or other facts; and he has cited *Chitty, Jr.* 626; *2 Campbell's Reports*, 450, 474; *Bailey on Bills*, 496. This doctrine we would have been disposed to receive as sound, even unsustained by such high authority, because it appears to us founded in reason.

When a promise to pay, *supra* protest, or an offer to give another bill is made, a new and direct contract, in some manner, intervenes between the acceptor and the holder. The former could not, without a bad grace, control the title of the latter to the draft, after having acknowledged it by treating with him as owner. But with the evidence before us, we cannot so readily admit its applicability to the present case. Our attention has been drawn to the draft sued on. The names of the acceptors appear on the face of it in two places, in one of which the names are erased. No date is to be found in either place; nor was any necessary, the bill not being payable after sight. From this circumstance appellees' counsel would have us infer that the bill has been accepted a second time after protest, which, according to him, would amount to a promise to pay. This fact alone, unexplained by any evidence, and which, perhaps, can be accounted for otherwise, does not, to our view, warrant the inference contended for. It might be the result of some hesitation in the drawees to accept; first writing their name, erasing it, and afterwards reinstating it. But if a second acceptance had been made after protest, as pretended, the necessity or expe-

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When the certificate to the record shows that it contains all the evidence adduced on the trial, the appellant may, at any time, call the attention of this court to any error on the face of the record, or try the case on the merits without any assignment at all.

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diency of erasing the first is by no means apparent to us, nor can we divine any rational object to be accomplished by a second acceptance, when the defendants were absolutely bound by the first.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed; and that ours be for defendants, as in a case of non-suit, the plaintiffs paying costs in both courts.

ROST ET AL. VS. BYRNE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The plea of the general issue, and compensation by the maker of a note, is an admission of the plaintiff's title to sue on it.

This is an action by the executors of S. Henderson, deceased, against the maker and endorsers of a promissory note.

The endorsers pleaded that they endorsed as the sureties of the maker; that he is not indebted to Henderson's estate, but, on the contrary, it owes him a balance, which they pray may compensate the plaintiff's claim, and that Byrne's property be discussed.

Byrne, the maker of the note, pleads the general issue, and averred that he is not indebted, but that Henderson's estate is indebted to him in a large sum, which he prays may compensate the demand sued on, and that he have judgment for the balance.

On these pleadings and issues the cause was tried. The plaintiffs produced the notes, protest and certificate of the

notary in evidence, and had judgment. The defendants made no proof. Byrne, the maker of the note, appealed.

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L. Janin, for the plaintiffs.

SANDERSON
vs.
OAKLEY ET AL.

Rawle, for the defendant and appellant, insisted there was no proof of the endorsements, and consequently the plaintiffs were not entitled to recover.

Bullard, J., delivered the opinion of the court.

This is an action against the drawer and endorsers of a promissory note. The drawer alone has appealed from a judgment rendered against him. He had pleaded the general issue and compensation. This, in our opinion, was an admission of the plaintiff's title to the note as endorsee. The appeal was evidently taken for delay.

The judgment of the District Court is, therefore, affirmed, with costs, and ten per cent. damages.

SANDERSON vs. OAKLEY ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A member of a commercial partnership may constitute the *firm* his attorney in fact, to endorse his name on notes payable to his order, in his absence.

Where a note is made payable at the counting-house of A, and the firm is changed to A B before the note becomes due, a demand at the counting-house of A B will be good.

The defendants are sued as makers of a promissory note payable to the order of "Joshua Fisher, at his counting-house in New-York." The note is endorsed to the plaintiff by J. & H. Fisher, as attorney in fact of Joshua Fisher.

EASTERN DIST. The evidence shows, that before the note became due,
February, 1840. Joshua Fisher took into partnership his brother, Henry
SANDERSON Fisher, but continued business at the same place, and occu-
VS. pied the same counting-room; that the demand of payment
OAKEY ET AL. was made *there* when the note became due; and it also
appeared that Joshua Fisher had appointed the firm his
attorney in fact, to act for him during his absence.

There was a verdict and judgment for the plaintiff, from
which the defendant appealed.

Preston, for the plaintiff.

T. Slidell, contra.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment on their
promissory note. The only questions presented for our solu-
tion relate to the legality of the endorsement, and the
demand.

1. The note was made payable to the order of Joshua
Fisher, at his counting-house, in New-York, who afterwards
took into partnership his brother, Henry Fisher, and traded
under the firm of J. & H. Fisher. The endorsement is in
the hand-writing of Henry Fisher, who made it in the name
of the firm, as attorneys of Joshua Fisher, who was then
absent, and is proved to have given his power of attorney to
the firm. The jury, in our opinion, correctly considered the
endorsement as valid.

2. The demand was made at the counting-house, which
was that of Joshua Fisher, at the time the note was made,
but had become *that* of the firm at the maturity of the note.

It is, therefore, ordered, adjudged and decreed, that the
judgment of the District Court be affirmed, with costs.

HOWE vs. FRAZER.

EASTERN DIST.

February, 1840.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

HOWE
vs.
FRAZER.

In actions of slander, when there is no question of law involved, the questions of fact and *quantum* of damages are so peculiarly the province of the jury, that their verdict will not be disturbed, unless manifest injustice has been done.

This is an action of slander, in which the plaintiff alleges, the defendant maliciously slandered, and with a view to injure his reputation and character, falsely and maliciously stated, in the presence of divers persons, charging him with being a robber, and had robbed his boat; meaning the steamboat *Romeo*. He alleges he has sustained damage to the amount of three thousand dollars, for which he prays judgment.

The defendant excepted to the petition, for want of certainty in its allegations, which was sustained, and leave given to amend.

The defendant then pleaded a general denial, and want of amicable demand.

Upon the testimony produced, the jury returned a verdict of five hundred dollars for the plaintiff. From judgment confirming the verdict, the defendant appealed.

McKinney, for the plaintiff.

Haines, for the defendant.

Bullard, J., delivered the opinion of the court.

This is an action of slander. The defendant is charged with having called the plaintiff a robber and a thief, and with having robbed his boat. The jury found a verdict for five hundred dollars, and the defendant has appealed. No question of law has been presented to this court; and as it relates to the questions of fact, and quantum of damages, they are so peculiarly of the province of the jury, that this court will not interfere, unless it should appear manifestly, that injustice has been done. Nothing has been shown which would authorize our disturbing the verdict.

The judgment is, therefore, affirmed with costs.

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WARING *vs.* CRAWFORD.

WARING
vs.
CRAWFORD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The possession of a note, together with the receipt, showing it had been endorsed to another for collection, is evidence of its re-transfer, so as to authorize the holder to sue as owner.

A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence, to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note.

This is an action by the payee against the maker of a promissory note. The plaintiff and payee endorsed the note to one Lawrence, and took his receipt, which showed that it was endorsed merely for collection. The note was afterwards returned, and the plaintiff erased his name from the endorsement, and commenced suit as the payee of the note.

The defendant denied that the plaintiff was the legal holder and owner of the note; and further averred, that he was in no way liable, as the note had been declared, by a competent tribunal in Tampico, to be fully paid. On the trial, the note sued on was offered in evidence. It was made payable to the order of the plaintiff, on which he made the following endorsement: "Pay to the order of James L. Lawrence. January 22d, 1837." Signed, "C. N. Waring."

Lawrence gave a receipt, headed as follows: "Received of Mr. Nicholas Waring, the following documents, *endorsed in my favor, for collection on his account.*"

The note sued on was included in this receipt. It was afterwards returned by Lawrence, and the plaintiff erased his name from the endorsement. The receipt was also offered in evidence to show the nature of the endorsement, and received by the court, but was objected to by the defendant's counsel.

There was judgment for the plaintiff, and the defendant appealed.

Rawle, for the plaintiff.

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VS.
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1. The receipt of Lawrence proves that he had no title or interest in the obligation sued on, and that he was the agent only of the plaintiff, from whom he received it for collection. The receipt was properly received in evidence, as it constitutes the very fact which is one of the subjects of inquiry. 1 *Starkie on Evidence*, edition of 1837, page 62.

2. The acts, doings and declarations of persons, which are pertinent and material to the issue between the parties, may be received in evidence, especially if against the interest of the actor or declarant, as part of the *res gestæ*. *Williams vs. Palmer*, 5 *Louisiana Reports*, 377; *Malchaux vs. Lefebvre*, 4 *Martin, N. S.*, 489; *Dismukes vs. Musgrove*, 2 *Louisiana Reports*, 340.

3. But if the receipt of Lawrence was not before the court, there would be no evidence that the obligation had ever been out of the possession of the plaintiff, who is the payee. The endorsement or assignment, without delivery, does not constitute a transfer. It is inchoate only. *Chitty on Bills*, page 263; *Ramsay vs. Livingston*, 6 *Martin, N. S.*, 17.

Briggs, for the defendant.

1. The plaintiff is not shown to be the owner of the note sued on, he having specially endorsed it to a third party, and no re-endorsement having been made thereon, the mere erasure of the special endorsement is no proof. *Chitty on Bills*, page 250, and note; *Arnold vs. Bureau*, 7 *Martin*, 291; *Robson vs. Early*, 1 *Martin, N. S.*, 374; *Dicks vs. Cash et al.*, 6 *idem.*, 45; *Perry vs. Gerbeau and Wife*, 5 *idem.*, 14; *Hyde et al. vs. Groce*, 7 *idem.*, 572; *Griffin vs. Jacobs*, 2 *Louisiana Reports*, 193.

2. That the testimony offered to prove such ownership, to wit: the receipt of the plaintiff's special endorsee is inadmissible, because it is the mere written declaration of a third party, not constituting part of the *res gestæ*, no proof being given that it was given contemporaneously with the endorsement which it is offered to qualify, or that the party was dead, or without the reach of a commission, and that, under

EASTERN DIST. these circumstances, it is *res inter alios acta*. *Starkie on Evidence*, vol. 1, page 46 ; 312 *et infra* ; *Phillips on Evidence*, vol. 2, pages 444, 641, 645, 585 and 668.

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VS.
CRAWFORD.

Martin, J., delivered the opinion of the court.

The defendant and appellant from a judgment on his promissory note, given to the plaintiff, has based his hope of relief at our hands, on the following grounds :

1. The plaintiff is not shown to be the owner of the note sued on, he having endorsed it specially to a third party, and no re-endorsement having been made.

2. The testimony offered to prove the ownership of the note, was inadmissible.

The possession of a note, together with the receipt, showing it had been endorsed to another for collection, is evidence of its re-transfer, so as to authorize the holder to sue as owner.

A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence, to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note.

I. It appears that the plaintiff had endorsed the note to one J. L. Lawrence, the 22d January, 1837, and on the 24th Lawrence gave his receipt therefor, acknowledging that it had been endorsed to him for collection. The plaintiff on receiving it back erased his signature to the endorsement. His possession of the note now corroborates the evidence which results from Lawrence's receipt ; so that, if the receipt was properly introduced in evidence, the plaintiff has fully established his claim to the amount of the note.

II. There cannot be a doubt, that a re-transfer of the note by Lawrence could be received in evidence. The receipt was certainly admissible, to show the nature of the endorsement, to wit : that the plaintiff did not thereby part with his interest in the note. His subsequent possession of it, coupled with the receipt, is evidence of a re-transfer.

Testimony of the nature of the endorsement was not received, and, perhaps, was not admissible. Written evidence could only be received, and it *only* was adduced. If Lawrence had been sworn as a witness, he could not have effectually denied the fact, evidenced by his receipt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

STATE vs. JUDGE BERMUDEZ.

EASTERN DIST.

February, 1840.

ON AN APPLICATION FOR A MANDAMUS.

STATE
vs.
JUDGE
BERMUDEZ.

A copy of a foreign will, authenticated only by an *ex parte* affirmation of an attorney in fact, is insufficient to authorize the judge of probates to register it in this state.

This is an application for a *mandamus*, commanding the judge of probates to enregister a foreign will.

Josephs, for the application, presented the petition of the testamentary executors of Samuel Hope, deceased, alleging that the will of the deceased was opened, duly proved and authenticated, and admitted to probate in Great Britain, where the deceased resided at the time of his death, a duly certified copy of which he presented to the judge of probates for the city and parish of New-Orleans, and prayed to have the same registered and made executory; that the deceased owned certain shares of bank stock in one of the banks of this city, which is all the property belonging to his succession in this state.

The petitioners further show, that Judge J. Bermudez, judge of probates of said court, refuses to enregister said will, unless letters testamentary are taken out, and a dative testamentary executor appointed, &c.; all of which would defeat the object and intention of the law.

The petitioners pray for a *mandamus*, commanding the judge to grant the order of registry as prayed for.

The judge returned for answer to the rule taken on him to show cause why the *mandamus* should not be awarded, the following grounds, &c. :

"The undersigned, judge of the Court of Probates of the parish and city of New-Orleans, in answer to the rule taken upon him to show cause why he should not grant an order for the execution and registry of the will of the late Samuel Hope, according to articles 1681 and 1682 of the Louisiana Code, without imposing any conditions, nor requiring any

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formalities not provided for by said articles, begs leave to assign the following grounds, why said rule should not be made absolute :

“ 1st., Because the executors of the instrument annexed to the petition, and by them styled a will, have furnished no legal or sufficient evidence of the execution of said will, which is neither an authentic copy of the testament of the late Samuel Hope, nor otherwise proved so as to entitle it to registry in Louisiana.

“ 2d., Because, even if said will were duly authenticated, it by no means follows, that this respondent, in his capacity of judge of the Court of Probates, has no other duties to perform than those prescribed in the articles relied on by the complainants, nor that these provisions embrace the whole law of Louisiana in relation to the registry and execution of last wills and testaments made in foreign countries.”

Bullard, J., delivered the opinion of the court.

The judge of the Court of Probates for the parish and city of New-Orleans, in answer to the rule granted in this case, says, among other causes shown, that the executors of the instrument annexed to the petition, and by them styled a will, have furnished no legal or sufficient evidence of the execution of said will, which is neither an authentic copy of the testament of the late Samuel Hope, nor otherwise proved as to entitle it to registry.

The paper purporting to be a copy of the will has been, by consent, exhibited to this court. It is not, in our opinion, authenticated in such a way as to authorize the judge to register it, and to order its execution. It is shown to be a copy only by an *ex parte* affirmation by an attorney at law in England.

Let the rule be discharged.

BRIGGS VS. STAFFORD.

EASTERN DIST.
February, 1840.APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE
PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.BRIGGS
VS.
STAFFORD.

A notary public, who signed the protest, cannot be received as a witness, to prove that no demand was made. A public officer, who has given a solemn certificate in his official character, and under his seal of office, cannot be listened to as a witness, to prove it false.

It does not necessarily follow, that the verdict is to be set aside on account of the admission of improper evidence. If the proof of notice to an endorser is not satisfactory, a verdict in his favor will not be disturbed.

This is an action against the endorser of a promissory note, protested for non-payment, and due notice thereof alleged to be given to the endorser. The defendant denied that the plaintiff was the legal holder of the note, or had any right to receive payment. He further averred, there was no legal notice of demand and protest ever given him, and prayed to be dismissed.

On the trial, the note, protest and certificate of notice was offered in evidence.

The defendant offered the notary who made the protest as a witness, who deposed that the protest was made on the day his daughter died, and in consequence of which the *demand and notice was made by his clerk*. This testimony was objected to, as contradicting the written protest and certificate of notice signed by the notary himself. The court admitted the testimony, and the plaintiff excepted.

Another witness deposed, that the defendant lived about forty miles from Covington, where the note was payable, and where the notice of protest was put in the post-office, addressed to him at that place; that the defendant lives about ten miles from Pearlinton, at which place there is a post-office, but there is no direct road to the latter place. It was not shown that the defendant was in the habit of receiving his letters and papers from the post-office at Covington.

There was a verdict and judgment for the defendant, from which the plaintiff appealed.

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Hennen, for the plaintiff.

Deslix, contra.

BRIGGS
vs.
STAFFORD.

Bullard, J., delivered the opinion of the court.

This is an action by the holder, against the endorser of a promissory note, alleged to have been duly protested for non-payment, and notice thereof given to the endorser. There was a verdict for the defendant, and judgment being pronounced thereon, the plaintiff prosecutes this appeal.

Our attention is first drawn to a bill of exceptions, from which it appears that the defendant offered as a witness E. P. Ellis, the notary who signed the protest filed in this case, to prove that no demand was made, which was objected to by the plaintiff, on the ground that the notary could not contradict his own acts; but the court admitted the witness to be sworn, notwithstanding the objection.

A notary public who signed the protest, cannot be received as a witness to prove that no demand was made. A public officer who has given a solemn certificate in his official character, and under his seal of office, cannot be listened to as a witness to prove it false.

We are of opinion that the court erred. A public officer, who has given a solemn certificate in his official character, and under his seal, cannot be listened to as a witness to prove it false. There is a degree of turpitude in certifying as true what the officer does not know to be true, as well as in certifying what he knows to be false. In either case, whatever may be the palliating circumstances in *foro conscientiae*, we think the falsity of the certificate ought not to be shown by the testimony of the officer himself: "*Allegans turpitudinem suam non audiendus*."

It does not necessarily follow that the verdict is to be set aside on account of the admission of improper evidence. If the proof of notice to an endorser is not satisfactory, a verdict in his favor will not be disturbed.

But it does not necessarily follow that the verdict is to be set aside on account of the admission of improper evidence. The proof of notice of protest is by no means satisfactory. It appears that the residence of the defendant is nearer another post-office than that in which the notice was deposited, and it is not clearly shown that the defendant was in the habit of taking his letters or papers out of the office where the notice was left. We cannot, consequently, disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

THAYER ET AL. VS. RIEDER.

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February, 1840.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

THAYER ET AL.
VS.
RIEDER.

It is no ground of complaint, that the cause was tried *ex parte*, when the defendant neglected to attend.

Where the error assigned might have been cured by evidence, it will not avail the party.

This is an action against the maker of the following promissory note :—

“Dollars, 375. “Philadelphia, July 14, 1834.

“On demand, I promise to pay to the order of William Rice, Esq., three hundred and seventy-five dollars, value received, without defalcation.” “FELIX E. RIEDER.”

The note was regularly endorsed to the plaintiffs. The defendant pleaded a general denial, and want of consideration, &c.

On the defendant's affidavit, a commission issued to Philadelphia, to take the testimony of witnesses, deemed material to establish the defence. The order for the commission was made on the 9th May, 1839. On the 13th of May, the cause came on for trial, and the defendant failed to appear. There was judgment for the plaintiff, with six per cent. interest, (Pennsylvania) and the defendant appealed.

Thielen, for the appellant, assigned the following errors :

1. That the case was tried *ex parte* on the 15th May, 1839, and judgment rendered against the defendant, whereas a commission to take testimony of witnesses in the city of Philadelphia was issued on the 9th May, 1839, and fifty days was allowed for the return thereof, as is shown by the order of court, to be found at page 6, of the record.

2. That the note sued upon is dated Philadelphia, July 14, 1834, and was payable on demand ; that no demand was made before upwards of four years and eight months had elapsed, and still the judge *a quo* has allowed interest at the

EASTERN DIST. rate of six per cent. per annum from the 17th July, 1834, as
February, 1840. will be found by reference to the note at page 5, and to the
THAYER ET AL. judgment at page 7 of the record: by reason of all which,
VS. appellant respectfully prays that the judgment of the court
RIEDER. below be reversed, and judgment be rendered in his favor.

Upton, contra.

Martin, J., delivered the opinion of the court.

The defendant and appellant has put this case before us on an assignment of errors.

1. The cause was tried *ex parte*, on the 13th May, 1839, and a commission had issued on the 9th of May, to take the testimony of witnesses in the city of Philadelphia, and fifty days allowed for the return thereof.

2. The note sued on was dated in Philadelphia the 14th July, 1834, payable on demand, and no demand was made until upwards of four years and eight months had elapsed; and that interest was allowed at the rate of six per cent. per annum from the 17th July, 1834.

It is no ground of complaint that the cause was tried *ex parte* when the defendant neglected to attend.

I. The defendant not having appeared when the cause came on for trial, he cannot complain that it was proceeded in *ex parte*. If the testimony which he expected from Philadelphia was essential, he should have been present, and prayed for a continuance.

Where the error assigned might have been cured by evidence, it will not avail the party.

II. The second error assigned might have been cured by evidence of the laws of Pennsylvania, allowing interest on notes of hand payable on demand, at the rate and in the manner which the judge *a quo* granted it.

The judgment of the Commercial Court is, therefore, affirmed with costs.

ZERINGUE vs. RIXNER.

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February, 1840.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

ZERINGUE
vs.
RIXNER.

Where a plea in compensation and re-convention, is sustained by the evidence, judgment will be given against the plaintiff for the balance due, after extinguishing his demand, with interest.

This is an action by the endorser against the maker of a promissory note, which the former alleges he has had to pay.

The defendant denied that the plaintiff had paid his note, but if he had, then he set up a demand in compensation and reconvention, which exceeded the plaintiff's claim by two hundred and forty-four dollars, on which he was entitled to legal interest. The District Court sustained the plea, and gave judgment in favor of the defendant, against the plaintiff, for the balance, with 5 per cent. interest. The plaintiff appealed.

Marsoudet, for the appellant.

L. Janin, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges he endorsed a note for the defendant, and took a mortgage, to secure him against said endorsement. He further alleges, that he has paid said note, and prays for an order of seizure and sale on his mortgage, which was granted.

The defendant made opposition on two grounds:

1. The plaintiff has furnished no proof that he has paid the note sued on.

2. That if he has paid the same, the debt is extinguished by compensation, and a balance due in reconvention, for this: that eight years ago, this opponent left in the hands of the plaintiff, the sum of eighteen hundred dollars, due him for land and slaves, purchased by the said plaintiff, on which he is entitled to five per cent. per annum interest, all of which remains unpaid. On this opposition, an injunction was obtained against the order of seizure and sale.

EASTERN DIST. The plaintiff pleaded a general denial, and prayed that the
February, 1840. injunction be dissolved.

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There was judgment sustaining the plea in reconvention, after extinguishing the plaintiff's demand, for the sum of two hundred and forty-four dollars, with interest at five per cent. The plaintiff appealed.

It is in proof, that in the year 1830, in the settlement and partition of the succession of Zenon Rixner, the plaintiff, Zeringue, whose wife was one of the heirs, became responsible, and engaged to pay the defendant, another of the heirs, the sum of eighteen hundred and eight dollars thirty-three and two-third cents. The above balance, was the price of land and slaves, received by the plaintiff, over and above the share coming to his wife, and consequently bears interest at five per cent. from the time it was due.

The judgment of the District Court, is, therefore, affirmed, with costs.

LAWRENCE & HILL vs. OAKLEY ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Whenever a person not a party to a bill or note, puts his name on it, he is presumed to have done so as surety, unless this presumption is destroyed by other circumstances appearing.

But where the endorsers' names appear first on a bill, although not the payees, and no explanatory evidence is offered, their endorsement will be considered as a direct and positive undertaking on their part, and not conditional.

By endorsing a bill not payable to their order, the defendants became guarantors for its punctual payment at maturity.

This is an action by the payees against the defendants, as endorser of a bill of exchange. One W. B. Tebo drew a bill at New-Orleans, December 19th, 1839, for nine hundred and thirty-seven dollars, payable to the order of Lawrence & Hill, at the counting-house of S. W. Oakey & Co., in New-Orleans, three months after date. The bill was drawn on Messrs. J. H. Duggan & Co., Rodney, Mississippi. It is endorsed by S. W. Oakey & Co., and by the payees, who are the holders.

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The plaintiffs allege, that the defendants endorsed said bill at the time it was drawn, and by agreement, charged two and one half per cent. commission for the use of their names. That by said endorsement they guaranteed the payment thereof at their counting-house, at maturity. That the bill was intended to have been drawn payable to their order, but was, through error, made payable to the plaintiffs. That it was accepted by the drawees, who reside in Mississippi and are said to be insolvent. The drawer has left the state, and the defendants are the only persons here liable for the payment of the same. They allege, that payment of this bill was demanded at the counting-house of defendants and refused, when it was protested, and due notice thereof given to all the parties interested. They pray judgment for its amount.

The defendants denied all the allegations in the petition, and admitted their signatures.

Upon these pleadings and issues the cause was tried. It is admitted that the only evidence offered on the trial was the bill of exchange and protest. The cause was submitted to a jury, with this evidence on the petition and answer. The jury returned a verdict for the plaintiffs. A strenuous effort was made to obtain a new trial, and overruled. From judgment confirming the verdict, the defendants appealed.

A. Peirce, for the plaintiffs:

1. When a person, not a party to a note or bill, puts his name upon it, he is presumed to have done so as surety, and as such, is as much bound as an endorser would be if regularly notified of protest. *Smith vs. Gorton*, 10 *Louisiana Reports*, 374.

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2. With this authority before the appellants they could not hope for success in this court. They are, therefore, liable for damages. 6 *Louisiana Reports*, 640, *Coffin vs. Pandelly*; 7 *Idem.*, 167, *Menard vs. Cox*; 8 *Idem.*, 180, *M'Phillins' Executors vs. Gillise*; 13 *Idem.*, 494, *Hubbell vs. Clannon*.

3. The plaintiffs counsel cited the following additional authorities. 3 *Martin, N. S.*, 659; 5 *Massachusetts Reports*, 358; 11 *Idem.*, 435; 3 *Idem.*, 274; 9 *Idem.*, *White vs. Howland*; 4 *Pickering*, 311, 383; 14 *Johnson*, 514; 2 *Douglass*, 514; 3 *Cowen*, 252.

G. B. Duncan, for the defendants:

1. The verdict and judgment in the court below, violate the first principles of the law of Bills of Exchange. The endorser of a bill of exchange is sued, and no evidence whatever offered that they had ever been notified of the protest. *Bayley on Bills*, 315; 1 *Martin, N. S.*, 321; 10 *Martin*, 707.

2. An attempt is made to hold the defendants liable to the plaintiffs, who are, themselves, the payees of the draft, and the defendants but endorsers. It is not pretended that no case can occur where a second may not be liable to the first endorser; it is only insisted that the law never presumes such liability; and it is only on special allegations, supported by competent testimony, that the legal presumptions can be destroyed, and responsibility attached to an endorser on a bill of exchange in the hands of a payee. *Herrick vs. Carman*, 12 *Johnson's Reports*, 160; *Sillman vs. Wheeler*, 17 *Johnson's Reports*, 328.

3. The cases from *Massachusetts Reports*, and 13 *Johnson*, 175; 14 *Idem.*, 349; 15 *Idem.*, 425, were all cases, where the declarations contained counts with special averments, similar in effect to those in the petition in this case; and where the proofs sustained the averments, the plaintiffs had judgment, not otherwise.

4. The case quoted from 10 *Louisiana Reports*, 374, is not strictly applicable to this case. There the instrument sued on was a promissory note, here it is a bill of exchange. The presumption which arose against the defendant in that case

cannot hold good in this. The court will not give the plaintiffs more favor than they have asked for themselves. They aver that it was intended, and that so all of the parties understood the case; that it was an error in making the draft payable to the order of the plaintiffs, whereas it was intended that the same should have been made payable to the order of the defendants. Suppose this had been done, the defendants would have been the payees and first endorsers, and the plaintiffs subsequent endorsers and holders. In that hypothesis, what would have been the rights and obligations of the parties? Assuredly the plaintiffs would have been obliged to prove notice of protest.

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5. In this community it has not been an unusual circumstance, on the contrary it is every day practice, for subsequent parties to sign instruments before those who are presumed to have signed first, have in fact done so. Promissory notes are frequently signed by the payees and endorsers, before they have been signed by the drawer. No inference is, therefore, to be drawn against the defendants, from the fact that they did endorse the draft before others had signed it, who were bound to do so in order to make it effectual.

Morphy, J., delivered the opinion of the court.

This case bears much analogy to, and can hardly be distinguished from that of *Smith vs. Gorton*, 10 Louisiana Reports, 376. It is brought on a bill of exchange, drawn by one Tebo, on Duggan & Co., of Mississippi, and made payable to the order of plaintiffs, at the counting-house of the defendants. The latter endorsed the bill for the purpose, it is alleged, of guaranteeing its punctual payment at maturity.

Whatever may have been the decisions made in other states, in cases of this kind, the well settled law here is, that, where a person, not a party to a bill or note, puts his name upon it, he is presumed to have done so as surety, unless he destroys that presumption by showing surprise, fraud, &c., or any other such circumstance. No explanatory evidence has been offered by defendants, why their names appear *first* on the back of this bill; we must then consider their endorse-

Whenever a person, not a party to a bill or note, puts his name on it, he is presumed to have done so as surety, unless this presumption is destroyed by showing some circumstance to that effect.

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But where the endorser's names appear first on a bill, although not the payees, and no explanatory evidence is offered, their endorsement will be considered as a direct and positive undertaking on their part, and not conditional.

By endorsing a bill not payable to their order, the defendants became guarantors for its punctual payment at maturity.

ment as a direct and positive undertaking, on their part, to pay this bill, and not as a conditional one. An absolute guaranty could have been written over their name. But the appellants contend that the plaintiffs should be bound by their own pleadings. That they have themselves averred that the bill was intended to have been drawn, not to their order, but to that of the defendants. They say, that if this had been done, defendants would have been payees, and first endorsers, and as such, entitled to all the rights of regular endorsers on negotiable paper. The fact of the bill having been domiciliated, for its payment, at the counting-house of defendants, gives strong countenance to this allegation of error. If such an error has been really committed, it is not by the plaintiffs, and it is one of which the defendants must have been cognizant. By putting their name to a bill not made to their order, they must have known that they were making themselves not endorsers, but guarantors, as the plaintiffs allege them to be. But after all, they might well be considered as having received that notice, which they complain of having been deprived of, in consequence of such error, for the demand on the acceptor has been made at their own counting-house, where they very well knew that no funds had been provided, and where they witnessed themselves, in some manner, the dishonor of the bill. The appellees have prayed for damages, as on a frivolous appeal. We do not think this a proper case to award them; an interested party may, perhaps, have had some doubts, and entertained some hopes of reversal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

POYDRAS vs. BELL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

POYDRAS
vs.
BELL.

The certificate of the notary is *prima facie* evidence of a demand on the maker of a note, and that it was made at his domicil, at the place stated therein, although it be not so set forth in the petition.

This is an action against the endorser of a promissory note. The plaintiff alleges, that, at maturity, said note was presented for payment at the store of the maker, (J. C. Morris) in St. Francisville, and protested for non-payment, and due notice thereof given to the endorser.

The defendant pleaded a general denial, and denied specially that any demand of payment was made on the maker of the note, and prays to be dismissed.

The plaintiff offered in evidence the note, protest and notary's certificate. The notary states in his certificate, that he went to the store of the maker of the note, in St. Francisville, on the day it became due, and demanded payment of his clerk (Morris being out), who replied he had no funds to pay it. Notice of protest was then put in the post-office at St. Francisville, directed to the endorser at New-Orleans, the place of his residence. It was in proof, that J. C. Morris, the maker of the note, kept a store at Bayou Sarah.

Upon this evidence, there was judgment for the plaintiff, and the defendant appealed.

L. Janin, for the plaintiff.

Mitchell, contra.

Morphy, J., delivered the opinion of the court.

This is an action against the defendant, as endorser of a promissory note drawn by one J. C. Morris. The only point made turns on the sufficiency of the demand made, on the maker of the note. It is proved by the notary's certificate, made out in conformity with the act of the 13th of March,

200 183
700 364
800 147
1000 643
2000 571
4000 186
6000 727
7000 493
10000 487
17000 386

EASTERN DIST. 1827. The notary states, that a demand was made at the store of the maker at St. Francisville, in the parish of West Feliciana. This is said to be insufficient, because the plaintiff's petition does not allege and set forth the maker's domicil to be there; and because, no place being mentioned in the note, the presumption is, that the drawer resides in New-Orleans, which is the residence of the payee. The presumption, if any exists, may be, that the note was executed in New-Orleans, but not that the maker had his domicil there. Be that as it may, the notary's certificate forms *primâ facie* evidence that the demand was made at the proper place, and is, *per se*, sufficient until rebutted by direct proof. The appellee has prayed for damages; they cannot be awarded, because he has not demanded them in due time, in accordance with article 890, of the Code of Practice.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WHITTEMORE vs. LEAKE & HOWELL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF WEST FELICIANA, THE JUDGE THEREOF PRESIDING.

A *certified copy* of the notarial protest, and certificate of notice to the endorsers, &c., is sufficient evidence of the protest and notice to the endorser.

Where the endorser lived seven or eight miles from town, notice of protest put in the post-office, addressed to him as of that parish and town, being the place where he received his letters, was held sufficient service of notice.

This is an action against the endorsers of a promissory note.

The defendants pleaded the general issue ; and averred, EASTERN DIST.
February, 1840. that there was no legal demand and protest ; and denied that they were legally notified as endorsers. They further pleaded the want of an amicable demand.

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On the trial, a duly certified copy of the protest and certificate of notice to the endorsers was offered in evidence, which was objected to by the counsel for the defendant on the ground that the originals should be produced or accounted for, as the best evidence. The court overruled the objection, admitted the evidence, and the defendant took his bill of exceptions.

The evidence showed that the defendants resided in the parish of West Feliciana, about seven or eight miles from St. Francisville, at which place they received their letters and papers, being the nearest post-office. The certificate of the notary states, that he deposited notices on the day of the protest, addressed to the endorsers in West Feliciana, St. Francisville, in the post-office at the latter place. The defendant's counsel contended that this was insufficient ; that they should have had personal notice.

There was judgment for the plaintiff, and the defendants appealed.

Boyle, for the plaintiff, urged the affirmance of the judgment, with damages and costs.

Turner, for the defendants, relied upon the following points for a reversal of the judgment :

1. The court erred in receiving the copy of the protest, and copy of certificate of notice, in evidence.
2. The testimony, if received, does not show that the defendants are liable, because it does not prove that they were duly and legally notified of the protest and dishonor of the note endorsed by them.
3. It is insisted there is no proof of legal notice to the endorsers. Notices were put in the post-office at St. Francisville, directed to them in West Feliciana, St. Francisville, when it is shown they live seven or eight miles from that

EASTERN DIST. town. Notice should have been given or sent to them personally, or left at their domicil. *Baily on Bills*, 171-2, February, 1840. 17; *Chitty on Bills*, 282, 395, 396; 5 *Martin*, N. S., 66, 359-60.
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Bullard, J., delivered the opinion of the court.

The defendants being sued as endorsers of a promissory note, rely upon the want of a regular protest, and due notice to them.

In the progress of the trial, the plaintiff offered in evidence a document purporting to be a copy of a notarial protest and certificate of notice. Its introduction was opposed on the ground that the original ought to be produced or accounted for; and that the copy of the certificate did not appear to have been recorded by the notary, nor to have been signed by two witnesses. These objections were overruled, the protest admitted, and the defendant took his bill of exceptions. It is the opinion of this court, that the judge did not err. The act of 1827, concerning protests and notices to drawers and endorsers, authorizes notaries to add a certificate to their protests, stating the manner in which any notices of protest to drawers and endorsers were served or forwarded, and it provides that "whenever they shall have done so, a *certified copy* of such protest and certificate shall be evidence of all matters therein stated."

A *certified copy* of the notarial protest, and certificate of notice to the endorsers, &c., is sufficient evidence of the protest and notice to the endorser.

The certificate of service appears to have been attested by two witnesses. Their names appear in the copy, and we are to presume that they signed the original. It is, therefore, not important to inquire whether the act of 1827 repealed that of 1821, in this particular. See 1 *Moreau's Digest*, 96.

Where the endorser lived seven or eight miles from town, notice of protest put in the post-office, addressed to him as of that parish and town, being the place where he received

But it is contended, that the notices given in this case, as it appears by the certificate, are not such as the law requires to bind the endorsers. The proof is that the notices were put into the post-office at St. Francisville, directed to them as of West Feliciana, St. Francisville; that they lived at between seven and eight miles from town; that they were in the habit of getting their letters there, and that there is no

post-office nearer to their residence. This appears to us sufficient notice, under the second section of the act of 1827, which provides that when the party to be notified does not reside in the town or city where the protest shall be made, then it shall be the duty of the notary to put into the nearest post-office, a notice of such protest to such drawer, acceptor, and endorsers, or others, addressed to them at their domicil, or usual place of residence. *Ibid.*

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ed his letters,
was held suffi-
cient service of
notice.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

***MONTPELIER ACADEMY TRUSTEES VS. GEORGE ET AL.**

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. HELENA, JUDGE MORGAN, OF THE THIRD, PRESIDING.

Where a corporation is made the mere creature of legislative will, established for the general good, endowed by the state alone, the legislature may, at pleasure, modify the act of incorporation or law, by which it was created. The trustees of such a corporation are mere mandatories of the State.

But where certain individuals are incorporated and constituted a body politic as trustees of an academy, with power to acquire property, and receive donations from individuals and the state, on condition to establish an academy and educate pupils; and, also, receive a yearly grant from the state, on condition to teach a certain number of indigent children, and comply with such conditions: *Held*, that the corporators acquired vested rights, in the nature of a contract, which cannot be taken from them by the state, without a manifest violation of the Constitution of the United States. ART. 1. SEC. 10.

This is an action instituted by the board of trustees of the Montpelier Academy, who were appointed by the original

*This case was decided at the January term, 1839, but suspended by an application for a re-hearing.

EASTERN DIST. act, creating and incorporating said academy, and constituting them a body politic, praying for a writ of *quo warranto*
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to issue against the defendants, who, they allege, have usurped the authority of trustees under an act of the legislature, which they allege to be unconstitutional; and requiring said defendants to show by what authority they exercise the rights and privileges of trustees of the Montpelier Academy.

The petitioners show, that by an act of the legislature, passed in 1833, the Montpelier Academy was incorporated, and they were appointed trustees in said act; created a body politic and corporate, with power to acquire property by donation, purchase or otherwise, on condition of establishing an institution for the purposes of education, and that they received a grant from the state of twenty-five hundred dollars per annum, on the further condition of educating twenty-five indigent children, and building houses sufficiently commodious to accommodate the students, &c. They allege that they have complied with the conditions of the act of incorporation, but that the legislature has, by two subsequent acts, modified and repealed their corporate rights, and ousted them from their office and corporate privileges and rights, and gave them to the defendants. They pray that the defendants be cited, and a writ of *quo warranto* awarded, requiring them to show by what authority they continue to hold and exercise the office of trustees, &c.; and that they be adjudged to deliver up to the petitioners as a corporation, all their corporate rights, records, funds, &c., with twenty-five hundred dollars in damages.

The defendants excepted to the right of the petitioners to sue, because the writ of *quo warranto* issued without proper authority, and that the plaintiffs were not the only, or all, of the trustees, but that others were created by the act of 1834; and for answer, they say that the corporate body created by the act of 1833, and modified, altered and continued, by subsequent acts, is a public eleemosynary corporation, wholly under the control of the legislature, who has the right to alter, amend, or abolish the same, whenever the public good

or convenience requires it; and that the defendants were appointed trustees under the act approved January 20th, 1836. They pray that the demands of the plaintiffs be rejected.

Upon these pleadings and issues the parties went to trial.

The learned and able district judge, before whom the cause was tried, summed up the case as follows :

The defence is based entirely upon the acts of 1834 and 1836, and consequently, the allegations of the plaintiff, so far as not put at issue by the pleadings, are admitted, or considered as proven. The first section, of the act of 30th of March, 1833, creates the corporation by the name and style of the Trustees of the Montpelier Academy, and "by that name, shall have perpetual succession, &c." Sec. 2d provides, that the said corporation shall have power and authority to acquire, possess and hold every species of property whatever, &c. Sec. 3d provides, that "it shall be the duty of the said trustees, and their successors in office, to administer the property and funds of the said corporation with prudence, &c. Sec. 4th, fixes the time of the meeting of the board, and authorizes the board to consider, that a member has resigned, if he should fail to attend if required, and to proceed to the election of another to fill the vacancy. By the 7th section, it is enacted, "that the board of trustees shall have power to remove all officers of their own body, as well as of the academy, at their pleasure, and again appoint others in their stead." The 10th section provides, that no part of the money appropriated by this act, shall be drawn from the state treasury, until it be proven to the state treasurer, by the certificate of the trustees of said institution, that convenient houses, sufficiently large to accommodate forty scholars, shall have been provided, and the title to which shall be vested in full property in the trustees of said academy, &c. These sections clearly establish, first, "that the board of trustees nominated in the first section, are clothed with the exclusive rights of removing members of their own body, and appointing others in their place; and secondly, that before they could derive any benefit from the appropriation made by

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the state; that they should acquire in full property, certain real estate. Corporations are of two kinds, political and private. Political corporations are those which have principally for their object the administration of a portion of the state, and to whom a part of the powers of government is delegated to that effect. Civil corporations, are those which relate to temporal police, such as colleges, or universities, founded for the instruction of youth, and the like. *Louisiana Code*, 420, 421, and 422. Such acts of incorporation as involve a contract, can only be repealed when the public good requires it; and then the legislature are bound to indemnify persons who may be injured by the repeal. The eighth section of the act under consideration, grants to the corporation the sum of twenty-five hundred dollars per annum for four years, on certain onerous conditions therein expressed, and for further conditions, to wit: 'the acquisition of certain real estate provided for by the tenth section.' This, in the opinion of the court, created a contract between the state and the board of trustees, created by the first section of the act, and their successors in office, legally chosen according to the provisions of that act; which cannot be avoided, modified or changed by the legislature, without the assent of the corporators." *Constitution of the State of Louisiana, article 6th, section 20.*

There was judgment restoring the possession of the corporation, estate real and personal, together with the records and archives thereunto belonging, to the plaintiffs, reserving to them any rights they might have for damages. The defendants appealed.

Andrews, for the plaintiffs:

1. The exception, that the trustees made by the act of 1834, as well as those originally constituted trustees by the act of 1833, are not made parties to the suit.

They are not recognized as being trustees. The legislature had no right to appoint them. But any individual may issue out, and maintain writ of *quo warranto*. See *Code of Practice, article 869*.

2. It is contended, that this is a public eleemosynary cor-

poration, and under the entire will and control of the legislature, and can be altered or abolished by them, at pleasure. EASTERN DIST.
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What is a public corporation? What a private one? See *Louisiana Code*, articles 420, 421, and 422.

3. The act of 1833, incorporating the Montpelier Academy, is a private act of incorporation. It creates a commutative contract between the legislature of Louisiana, and the corporators, and their successors, duly elected by themselves, in conformity with their charter; and the act of 1836 is a law impairing the obligation of that contract; and consequently, null and void. *Constitution of the U. S.*, article 1, section 10. *Constitution of Louisiana*, article 6th, section 20.

See also the case of the trustees of *Dartmouth College vs. Woodward*, 4 *Wheaton's Reports*, 518. See, also, 11 *Peters'* 420, *Charles River Bridge vs. Warren Bridge*, which will be relied upon by the defendants, but it is not a parallel case.

4. The charter gives perpetual succession to the individuals in whose favor it is passed, and it provides for the manner in which said succession shall be kept up, viz: by elections duly made by them, said corporators, according to said charter. See act of 1833, page 108, section 1, 3, 5, and 7.

5. The article of the code 438, if it indeed can be applied to a case like this, must be strictly pursued. It authorizes the legislature, when the public good requires it, to abolish corporations by indemnifying and remunerating the corporators, in the same way as any private property can be taken for public use. But this does not authorize them to continue the corporation under the control of others, any more than their having the power, or the District Court having the power, to grant divorces or dissolve matrimony, authorizes them to appropriate a man's wife to themselves, or to give her to another.

Lawson, for the defendant :

Corporations, legally established, can exercise and enjoy all the rights which belong to them by their charters, and none other. *Louisiana Code*, article 424; 2 *Kent's Com.* 226. The modern doctrine is to consider corporations as having

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such powers as are specifically granted by the act of incorporation. 2 *Kent's Com.* 239. The plaintiffs contend, that the act of incorporation, by which the corporation was called into existence, is a contract between the state and the corporators; and that this contract has been violated on the part of the state, and the defendants in this case. The defendants deny the allegations of plaintiffs, and aver that they have committed no wrong, because they are exercising functions conferred on them by the legislature, and that the legislature had a right to pass the act clothing them with authority. The issue then was, in the court below, does the act of incorporation amount to a contract between the state and the corporators? and, if so, had the legislature a right to oust the trustees, and substitute the defendants? These questions, I shall consider at present, so far as the refusal of the judge *a quo* to continue the case or hear testimony, is concerned.

2. If the act of incorporation is a contract between the state and the trustees, how is it to be established? By the production of the act. How is its violation to be shown? By proof, unquestionably, as in all other cases of violations of contract.

The defendants admit that they enjoy the franchises originally granted to the plaintiffs, but justify that enjoyment and possession by an act of the legislature, expressing the sovereign will of the state. Was the court, then, correct in refusing to continue the case, and to hear evidence in defence? Or in other words, was the judge correct in receiving the admissions of defendants, as evidence of the violation of a contract, and rejecting so much of the admission as justified that possession, by an act of the legislature.

The rule of law is, that admissions must be taken together, and the court violated this indisputable elementary principle, in refusing to hear evidence.

3. The judge, in refusing to hear evidence, violated the clearest principles of law. He, in substance, asserted that there was no contingency that would justify the legislature in interfering with the franchises originally granted.

Suppose the legislature, subsequent to the incorporation, EASTERN DIST. February, 1840. "deemed it necessary, or convenient to the public interest," or the corporation had forfeited its charter by "the abuse of its privileges," or the refusal "to accomplish the conditions" on which they had been granted, would it not be necessary for the party who is accused of usurping the franchises of others, to show the reasons for the exercise of these privileges? It is substantially averred by the defendants, that the contingency contemplated by law, did occur, in alleging that the legislature had the power reserved in the elementary principles of the *Louisiana Code*, article 438.

4. The corporation is a public one, and the legislature has the power to alter, amend or abolish its charter, whenever "they deem it necessary or convenient to the public interest," or the corporation abuse its privileges, or refuse to perform the conditions of the act of incorporation. *Louisiana Code*, article 438. *Old Code*, page 92, article 22.

5. The power to dissolve corporations, necessarily includes the right of resuming the franchises and privileges, which had been granted, and of transferring them to other persons. If I sell a tract of land to A, with the right reserved of resuming my property whenever I deem it convenient or necessary to my interest, can it be pretended that A, has acquired an unconditional and absolute interest in the property? Or that I cannot resume the possession and substitute B, in the use and enjoyment of it, without violating my contract with A. Admitting, then, for argument, that a legislative grant is a contract within the intendment of the constitution, yet it must be so with all the conditions imposed by law. The elementary principles of our code enter into, and form a part of that contract, and the legislature may, whenever they deem it necessary or convenient, abolish it by dissolving the corporators, and by substituting others.

6. In a public grant, nothing passes by implication; and the act of incorporation can contain nothing exclusive of the public right to resume the franchises or privileges granted to the plaintiffs. 11 *Peters' Reports*, 547; 11 *Ibid.* 539.

7. If a contract to that effect should be implied, it would

EASTERN DIST. be void for want of authority in the legislature, to make
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right thus said to be parted with, is one which is essential to the security and well being of society ; entrusted to the legislature for purposes of government and general good, and such rights are never presumed to be conveyed or restricted. They are entrusted to the legislature to be exercised, not bartered away ; and it is indispensable that each legislature should assemble with the same measure of sovereign power that was held by its predecessors. 11 *Peters' Reports*, 422.

8. The court was clearly wrong in deciding that the old board should have the appropriation of ten thousand dollars, made on the 11th March, 1836. It cannot be presumed that the legislature intended to appropriate money in favor of a set of men whom they had, by legislative enactment, declared should be ousted, and deprived of the right of exercising the franchises granted by the act of incorporation.

9. The right of the state to control and superintend her institutions of learning, is a sovereign power. Sovereignty is inherent, inalienable, and indivisible. But it is objected that the state, by an act which substitutes the defendants to the plaintiffs' franchises and privileges, has virtually resumed its own grant. To this, it is replied, that the principle which forbids the resumption of one's own grants, does not apply to the exercise of the eminent domain. Thus, a turnpike road may be appropriated to make a canal. - *Rogers vs. Bradshaw*, 20 *Johnson*, 735. The same rule applies to the exercise of all sovereign powers ; otherwise each legislature could not assemble with the same measure of sovereign power that was held by its predecessors.

Carleton, J., delivered the opinion of the court.

The petitioners aver, that they are the trustees of the Montpelier Academy, in virtue of an act of the state legislature, in the year 1833, by which that institution was created and established in the parish of St. Helena ; that they have been for some time in the due exercise of the duties of their office as such, and possessed considerable property appertain-

ing to the academy, viz : one house and lot, in Montpelier, known as the Montpelier Academy, and one other house, known as the steward's house, of the value, altogether, of three thousand five hundred dollars ; that they are, furthermore, entitled to receive two thousand five hundred dollars, the yearly allowance granted by the state to the institution, and that they hold other funds, by donation, amounting to fifteen hundred dollars ; that, while in the discharge of their legal functions, they were interrupted by the defendants, who have organized themselves into a pretended board of trustees of said academy, and appointed William George, their president, and thereupon passed accounts, drafted for the funds of the institution, demanded the archives, and usurped other rights, legally and exclusively invested in the petitioners, by reason of which they have sustained damage in the sum of two thousand five hundred dollars, and conclude with a prayer for citation, and a writ of *quo warranto*, requiring the defendants to show by what authority they claim to exercise the rights of trustees of said academy. The writ was accordingly granted.

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The defendants appeared by their counsel, and after setting up certain exceptions which it is not material to notice, allege that the petitioners are not the only trustees of said academy ; that, by a law of the legislature of the 9th January, 1834, six other additional trustees were appointed, and continued to act in conjunction with those appointed by a law of 1833, until they were all ousted by another act of 20th January, 1836, by which the defendants, five in number, were constituted the only legitimate board, duly authorized to act ; that the said corporation created by the law of 1833, modified and continued by those of 1834 and 1836, is a public eleemosynary corporation, and wholly under the control of the legislature, and subject to be altered or abolished at their pleasure.

The District Court decreed in favor of the petitioners, requiring the defendants to restore the archives, property, revenues and funds of the institution, that had come into their possession. The defendants have brought the cause before us by appeal.

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By a law of 30th March, 1833, entitled an "act to incorporate the Montpelier Academy," &c., it is, in substance, provided, that Dempsey Kemp, Burlin Childers, James Harvey, Thomas Kennedy, R. Mercier, William Mathews, Thomas G. Davidson, T. Smith, David Hill and James M. Bradford, be constituted a body politic and corporate, by name and style of the Trustees of Montpelier Academy, and by that name shall have perpetual succession, and be capable of appearing in all courts of justice in the state, and shall have a common seal, with power to break, alter or renew the same at their pleasure.

Section second provides, that the corporation shall have the power to acquire and possess every species of property, moveable and immoveable, by purchase, bargain, transaction, suits at law, donation, whether *inter vivos* or *mortis causa*, or in any other manner known to the laws of Louisiana; that they may again sell, rent, lease or alienate the same for the good of the corporation. That they shall have full and ample power to pass all by-laws, rules and regulations which they may deem necessary for the better government of the corporation; provided they be not contrary or repugnant to the constitution and laws of the United States, or those of Louisiana.

Section third provides, that the trustees and their successors shall administer the property and funds of the institution; shall establish their academy at St. Helena, and shall have power to employ professors and tutors, and fix their salaries.

The fourth section provides for two stated annual meetings for the board of trustees, with power to fill all vacancies, by election, that may occur among themselves.

Section seventh, provides for the removal of all officers by the corporation, and the appointment of others in their stead.

The eighth provides for the payment by the state treasurer, of two thousand five hundred dollars, yearly, on condition that twenty-five indigent children be instructed and boarded in the academy, otherwise a sum in proportion to the number that shall be so instructed and boarded.

The ninth, provides for the payment to the trustees, of the

moneys belonging to the parishes of St. Helena and Livingston, which have been heretofore applied to the use of primary schools. EASTERN DIST.
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The tenth section declares, that the two thousand five hundred dollars, appropriated by the state, shall not be drawn from the treasury, until it shall appear, that the trustees have provided sufficient houses, conveniently large for the accommodation of forty scholars, the title of which shall be in the academy.

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By a supplemental law of the 9th January, 1834, John Holloway, John George, Hillory Kemp, Jos. Killian, Senr., John Killian and William Venables, are appointed additional trustees to those named in first section of the act of 1833.

By an amendatory act, passed the 20th January, 1836, it is provided, that the first section of the above act be so amended "that the board of trustees of the Montpelier Academy, shall be composed of only *five members*, and that Robert Duncan, John Killian, B. Spillers, Zachariah Nettles and William George, compose the said board of trustees."

The second section provides for the repeal of all laws or parts of laws, contrary to the provisions of the first.

It is contended by the defendants, that the legislature had full power to alter or abolish at pleasure, the law creating the corporation, and they cite the *Louisiana Code*, article 438, which declares that "a corporation, legally established, may be dissolved by an act of the legislature, if they deem it necessary or convenient to the public interest; provided, that where the act of incorporation imports a contract, on the faith of which individuals have advanced money, or engaged their property, it cannot be repealed without providing for the reimbursements of the advances made, or making full indemnity to said individuals," &c.

On the part of the plaintiffs, it is insisted that the law of 1833, created a contract between the state, the trustees, and donors of property to the institution, and that the acts of the legislature of 1834 and 1836, are contrary to the constitution of the United States, and of Louisiana, both of which declare in the same language, that no state legislature shall pass

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This, therefore, is the question raised for our consideration. The Civil Code recognizes two classes of corporations, political and private. The private is again divided into civil and religious, to the former of which belongs the corporation of the Montpelier Academy.

Where a corporation is made the mere creature of legislative will, established for the general good, endowed by the state alone, the legislature may, at pleasure, modify the act of incorporation, or law by which it was created. The trustees of such a corporation are mere mandatories of the state.

There can be no doubt, that where a "corporation is the mere creature of legislative will, established for the general good, and endowed by the state alone, the legislature may, at pleasure, modify the law by which it was created. For in that case, there would be but one party affected, the government itself, and therefore not a contract within the meaning of the constitution. The trustees of such a corporation would be the mere mandatories of the state, having no personal interest involved, and could not complain of any law that might abridge or destroy their agency. But it would be otherwise with a corporation, such as that under consideration: for though a part of the endowment of the Montpelier Academy may eventually proceed from the state, yet they bestow nothing, until the institution shall be able, from its own resources, to afford accommodations for forty scholars, when a sum not exceeding two thousand five hundred dollars, is to be annually paid out of the treasury, to be graduated by the number of indigent students that are boarded and instructed in the school. So that the institution does, in truth, originate in private charities, not at all affected in its essential character by the moneys given by the state. The trustees and instructors do not thereby become agents or officers of the government, nor does the property purchased, or the donations made, appertain to the public. The power to appoint all the officers of the institution still abides exclusively in the trustees, who fix the course of studies, the salaries to be paid, fill all vacancies that occur, and administer and apply the funds of the institution at their pleasure.

Again, the trustees named in the first section of the charter of 1833, are authorized to acquire property in all the modes

known to the laws of Louisiana, one of which, by donation *inter vivos*, is expressly mentioned. By the documents coming up with the record, it appears that they did accordingly purchase certain real property, and on the 10th January, 1834, receive by donation from I. T. Preston, a house suitable for the academy, and the lands on which it stood. The persons then acting as trustees, were those designated in the charter of 1833, or others appointed as their successors under that law. They accepted the trusts, entered upon the duties prescribed, and became the assigne and donors of all acquisitions made for the benefit of the academy. The donation was made to them, not to the defendants; who were unknown to the donor, and appointed subsequently in a way not recognized by the charter. He could not have anticipated, and never consented that his donation should pass into other hands than those of the trustees created by the law of 1833. The state stipulated with him, through these trustees, that his gifts should inure to the benefit of the academy, and be forever administered by the persons named in that act, and their successors chosen as is therein prescribed. It was clearly a contract entered into between the donor and trustees, for the transfer and perpetual security of property, under the plighted faith of the state. Nevertheless, the legislature have entirely overthrown this board of trustees without observance of any of the forms of law, and transferred, against their consent, all their powers and rights to five other persons, whom they substitute and appoint in their stead.

It is plain that two boards of trustees cannot exist at the same time. If the five created by the act of 1836, have a legal existence, then the first board is abolished. And if the legislature can, at pleasure and without judicial proceedings, destroy one board and create another, there is no constitutional limit to their power. They might proceed one step further, abolish both boards and appropriate the funds of the institution to the use of the state. Such would be the alarming consequences to which the doctrines set up by the defendant's counsel must lead, unless some restraint be set upon legislative authority.

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This view of the subject is abundantly sustained by English authorities, were it necessary to call in their aid. *Justice Blackstone*, 2, *Com.* 57, in speaking of a corporation, says, it is a franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise or freedom. There is a grantor and grantee whose assent is necessary; the king parts from his prerogative under an implied promise not to bestow the same franchise on another corporate body. It therefore involves a contract not to re-assert the right, to grant it to another, or impair it. And *Justice Buller*, in the case of *King vs. Passmore*, 3 *Term Rep.* 246, observes, that the grant of incorporation is a contract between the crown and a number of persons, the latter of whom undertake, in consideration of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. To the same effect may be consulted, *Powell on Contracts*, 6; *Fletcher vs. Peck*, 6 *Cranch*, 87; 1 *Lord Raymond*, 5; 2 *Term Reports*, 346; 1 *Kyd on Corporations*, 25.

The sanctity of contracts is equally protected by that system of jurisprudence from which our own is derived. *Nemo potest mutare consilium suum in alterius injuriam. Digest*, tit. 50; l. 75. *Sicut ab initio libera est potestas habendi, vel non habendi contractus, ita renunciare semel constitutæ obligationi adversario non consentiente nemo potest. L. sicut initio liberat, 5 Code, de. ob.*

Upon which a learned commentator remarks, "*Il est donc certain que nous ne pouvons pas changer de sentiment, sitôt que l'acte ne dépend plus de notre volonté. Les contrats nous fournissent un exemple familier, des lorsqu'ils sont clos et parfaits, l'une des parties ne peut pas s'en dégager malgré l'autre ni rompre un traité, dont l'exécution est devenue nécessaire. Dantoine, vol. 2, page 217.*"

Nor does our constitution create or establish any new principle of justice: it only enforces those immutable laws of natural equity that prevail throughout the world, and existed long before codes or constitutions were known.

This subject has been fully examined by some of the ablest jurists in our own country, in the celebrated case of the *Dartmouth College vs. Woodward*, and the question finally settled by the judges then on the supreme bench of the United States, with only one dissenting voice. 4 *Wheaton*, 518.

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From that case it appears, that the Rev. Eleazar Wheelock, of Connecticut, originated, about the year 1784, at his own expense and on his own estate, a school for the education of Indians; that thereafter, various contributions and donations were made for the advancement of the institution, which was incorporated by the King of England, and erected by charter into a college, called Dartmouth College, for the general purposes of education. The number of trustees was limited to twelve; and the usual powers of acquiring property, of suing and being sued, &c., were imparted as to other incorporations. The trustees were, moreover, empowered to appoint all the instructors and officers of the college, and to perpetuate their own body by filling any vacancies that might occur; no endowment whatever having been made by the crown.

The legislature of New-Hampshire, where the college was located, passed various laws, modifying and enlarging the charter of the institution. One of June, 1816, provides, that the trustees shall thereafter be called the trustees of Dartmouth University, and their number increased from twelve to twenty-one, including the old board, and to them were transferred all the powers of the trustees of Dartmouth College. The act, moreover, provides for the appointment of a board of twenty-five overseers, who are invested with a general superintending authority.

The court thought that the original charter was a compact between the crown, the trustees and donors of property for the benefit of the institution, and that the acts of the legislature of New-Hampshire, by increasing the number of trustees, appointing twenty-five overseers, new modelling and enlarging the charter, and by transferring the property from the old board to the new, was a violation of that compact and repugnant to article 1, section 10, of the Constitution of the United States above cited.

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But where certain individuals are incorporated and constituted a body politic, as trustees of an academy, with power to acquire property and receive donations from individuals and the state, on condition to establish an academy and educate pupils, and also receive a yearly grant from the state, on condition to teach a certain number of indigent children and comply with such conditions: *Held*, that the corporators acquired vested rights, in the nature of a contract, which cannot be taken from them by the state, without a manifest violation of the constitution of the United States, article 1, sec. 10.

The question involved in the cause now under consideration is, in principle, essentially the same with that settled by the Supreme Court of the United States, in the case of the Dartmouth College. The two cases differ only in the degree of injury complained of; that tribunal thought that the rights of the corporators were infringed, by increasing the board of trustees from twelve to twenty-one members: then, for a much stronger reason, is the charter of the Montpelier Academy violated, by a law entirely removing one board and substituting another in its stead.

We are, then, of opinion that the law of the 30th March, 1833, incorporating the Montpelier Academy, was in the nature of a contract between the state, the trustees therein named, and the donors of property for the benefit of that institution, and that the acts of the legislature of the 9th of January, 1834, and of the 20th of January, 1836, above cited, are repugnant to the Constitution of the United States, and that of Louisiana.

Wherefore, it is ordered and decreed, that the judgment of the District Court be affirmed, with costs.

Lawson, on behalf of the defendants, applied for a re-hearing, and the case was suspended until this term, when a re-argument was had.

Morphy, J., delivered the opinion of the court.

This case has come before us on a re-hearing. The grounds and arguments urged by the appellants, are substantially the same as were addressed to the court, on the former trial; although, from the zeal and industry of counsel, they have received new illustrations and have been much more fully developed. After the most attentive consideration, we have been able to give to the whole subject, we must declare that the views of this court, as at present organized, have coincided with those expressed in the opinion already delivered:

It is, therefore, ordered, that the judgment of this court remain undisturbed.

ELWYN *vs.* JACKSON ET AL.

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APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

ELWYN

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The City Court of New-Orleans is without authority to grant orders of seizure and sale, especially when the property to be seized is situated out of the city limits.

But the jurisdiction of the City Court of New-Orleans, does not extend to actions of a *real nature*. It is limited to actions *in personam*; except in cases of attachment in which authority is expressly given.

A hypothecary action is one of a *real nature*, whether the property mortgaged be in the hands of the mortgagor or in the possession of a third person.

This suit commenced by injunction. The plaintiff was in possession of a lot of ground, situated in the parish of Jefferson, on which the defendants held a mortgage for the payment of the original price, and had obtained an order of seizure and sale from the presiding judge of the City Court of New-Orleans, which they were proceeding to execute. The plaintiff alleges, that he is in danger of being disquieted in his possession and title, by a law suit, and in danger of eviction, and the title to said lot rendered so precarious that he is unable to sell it for half price; all of which the defendants have had full knowledge, and have failed to offer or give him the necessary security against said disturbance, but have advertised the property for sale, and caused him serious injury; that said sale, if proceeded in, is illegal, for the following reasons: 1. There is no demand of payment before seizure, in the manner prescribed by law. 2. That this court has no jurisdiction to issue an order of seizure and sale, as has been done here. 3. The sale is improperly advertised, being for more than is necessary to cover the amount due. He prays for an injunction, staying said proceedings; and for judgment, for one thousand dollars in damages.

The defendants admit they obtained an order of seizure and sale, after having made the necessary demand of payment, and offer of good and sufficient security, which the plaintiff refused. They negative all the other allegations in

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February, 1840. damages.

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Upon these issues and pleadings, the cause was tried.

The presiding judge of the City Court, being satisfied from the evidence and showing of the parties, that the injunction improperly issued, gave judgment dissolving it, with damages, and ordered the defendants to give security for the title to the lot in question. The plaintiff appealed.

Elwyn, in *propria persona*, contended that the City Court had no jurisdiction, and was without authority to issue an order of seizure and sale, which is in the nature of a *real action*.

2. He contends that he was not duly notified of the seizure according to law ; or that demand was not made three days before the seizure by the sheriff.

Eggleston, for the defendants, insisted the court had jurisdiction to issue an order of seizure and sale, when the mortgaged debtor resided within its territorial limits. 3 *Martin*, N. S., 652.

2. The court could entertain jurisdiction of the principal demand, which is evidenced by a promissory note, and enforce payment by ordering the mortgaged property to be sold.

3. The plaintiff had three days notice of the issuing the order before seizure, which is all that was required. *Code of Practice*, article 735 ; 7 *Martin*, N. S., 516.

4. The evidence shows security against eviction was tendered to the plaintiff, previous to proceeding against the property, and refused by him. He had no right to demand freehold security. The injunction was therefore properly dissolved.

Bullard, J., delivered the opinion of the court.

The presiding judge of the City Court having issued an order of seizure and sale, against a lot situated in the parish of Jefferson, the owner and mortgagor obtained an injunction to stay proceedings, on the following grounds :

1. Because the demand of payment before seizure had not been made, as required by law. EASTERN DIST.
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2. Because the court has no jurisdiction such as has been exercised in the premises ; and,

3. Because the sale is advertised improperly ; that the writ should not call for a sale of more than enough to cover the amount due.

The view we have taken of this case renders it unnecessary to consider the first and third grounds. We shall confine our attention to the question of jurisdiction of the City Court.

The statute creating the City Court, (*see 1 Moreau's Digest, 345*) declares, that each of the associate judges shall severally and individually have jurisdiction and power to hear and determine all civil causes, "*except those of a real nature,*" arising within or where the defendant resides, within the limits described in the second section, &c. The fifth section defines the jurisdiction of the presiding judge of the City Court. He has power to decide in similar cases, but to

a higher amount, "to hear any civil cause which is grounded upon bills of exchange, promissory notes or other moneyed obligations," &c. It is true this section does not expressly exclude *real actions* from the cognizance of the presiding judge ; but we think the whole statute must be taken together. The presiding judge and the four associate judges constitute together the "City Court of New-Orleans." The presiding judge has jurisdiction to a large amount, it is true, but essentially in the same class of cases, to wit : actions *in personam*, except in cases of attachment, the power to issue, which writ is expressly given by another section. That the presiding judge was competent to pronounce against the defendant upon his note, which evidenced the principal obligation, we do not doubt, but then it must have been according

to the peculiar practice of that court, as established by the 11th section of the act. The process issued in this case was an order of seizure and sale, and the object to be seized was beyond the territorial limits of the city. "An hypothecary action, (says the Code of Practice, article 61) is a *real action*, which the creditor brings against the property which has been

The City Court of New-Orleans is without authority to grant orders of seizure and sale, especially when the property to be seized is out of the city limits.

But the jurisdiction of the City Court of New-Orleans does not extend to actions of a *real nature*. It is limited to actions *in personam*, except in cases of attachment in which authority is expressly given.

A hypothecatory action is one of a *real nature*, whether the property mortgaged be in the hands of the mortgagor or in the possession of a third person.

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EASTERN DIST. hypothecated to him by the debtor," &c. Whether the
February, 1840. property mortgaged be still in the hands of the mortgagor, or
in the possession of third persons, the action is equally a
a real one.

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The appellee relies upon the case of *Marigny vs. Hunt*, (3 *Martin, N. S.*, 652,) to show that the judge of the place within whose jurisdiction the defendant, in an hypothecary action, resides, has authority to grant an order of seizure and sale. That we do not doubt; and by article 163, of the Code of Practice, the plaintiff may commence proceedings either in the parish in which the property is situated, or that in which the defendant resides. But then it must be a competent judge, one of general jurisdiction; and it by no means follows that the presiding judge of the City Court has a right to direct an order of seizure and sale, obtained *ex parte*, to the sheriff of the parish of Jefferson.

We have also been referred to the act of 1838, amendatory of the several acts to organize and regulate the practice of the City Court. The third section, it is true, authorizes the presiding judge to decide upon the rescission of a sale of real estate, or slaves, when claimed by way of reconvention in a suit upon a note given for the price; but that act cannot be construed to give the power contended for in this case. *Acts of 1838, page 56.*

We conclude that the court erred in dissolving the injunction.

It is, therefore, ordered and decreed, that the judgment of the City Court be avoided and reversed; that the injunction be reinstated and made perpetual, and that the appellees pay the costs in both courts.

MARTIN, PLEASANTS & CO. vs. BRANCH BANK OF ALABAMA
AT MOBILE.

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February, 1840.

MARTIN,
PLEASANTS & CO.
vs.
BRANCH BANK
OF ALABAMA
AT MOBILE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

A corporation or bank in which the stock is entirely owned by another state, and created by its laws, may be sued in the courts of this state.

An attachment lies against the property of a corporation, incorporated by the laws of another state.

The plaintiffs allege, they are holders of bank notes issued by the Branch Bank of the State of Alabama at Mobile, amounting to two thousand eight hundred dollars, that said bank is a corporation, created by a law of the State of Alabama, and liable to be sued.

The suit commenced by attachment of property belonging to the bank in New-Orleans. The plaintiffs pray that an attorney be appointed to represent the Bank, and that, after due proceedings had, they have judgment, and that certain property attached be sold to satisfy their demand.

The attorney appointed to represent the defendants, excepted to the action, and suggested, that the court could not entertain jurisdiction of this case, because the State of Alabama is the sole proprietor of the bank, and is not bound to appear in the courts of this state; that the defendants have not such an existence and residence as to enable this court to compel an appearance, or maintain jurisdiction by attachment. He prays that the suit be dismissed.

On the merits, a general denial was pleaded.

Upon these pleadings and issues the cause was tried.

The judge *a quo* overruled the exceptions; and, on proof of the plaintiffs' demand, judgment was rendered in their favor; from which the defendants appealed.

Jones, for the plaintiffs, contended:

1. A state of the Union, in becoming a stockholder in a banking institution, loses its character as a sovereign, and is

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 February, 1840. 11 *Peters' Reports*, 349 ; *Bank of the United States vs. The Planters' Bank of Georgia*, 9 *Wheaton*, 904.

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2. Corporations, for the purposes of suing and being sued, are considered as individuals. 5 *Cranch*, 61 ; *Beaston vs. The Farmers' Bank of Delaware*, 12 *Peters*, 134 ; *Bank of Augusta vs. Earle*, 13 *Peters*, 583.

3. A foreign attachment lies against a corporation incorporated by the laws of another state. *Bushell vs. The Commonwealth Insurance Company*, 15 *Sargeant and Rawle*, 172. It is the universal practice of our courts to sustain such proceedings. *Edmondson vs. The Mississippi and Alabama Rail Road and Banking Company* ; *Robinson vs. The same* ; *Oakey et al. vs. The same* ; *Denton vs. Commercial and Rail Road Bank of Vicksburg*, all in the 13th volume *Louisiana Reports*.

Chinn, for the defendant, insisted, that the court was without jurisdiction, and could not proceed against a corporation owned, and which was the property of a sovereign state. A state cannot be sued, or compelled to appear in the courts of another state.

2. A sovereign state cannot be sued in attachment ; so, a corporation created and owned by a state is not amenable to the courts of another state. A corporation not being a natural person, process can only be served on its head or chief officer, within the jurisdiction of the state where this artificial body exists. There is nothing in this case which can give jurisdiction to the court. See the case of *M'Queen and others vs. Middletown Manufacturing Co.*, 16 *Johnson*, 5.

Martin, J., delivered the opinion of the court.

The defendants have based their expectation of the reversal of the judgment on two propositions :

1. That they are not sueable at all.
2. That they cannot be sued by attachment.

1. They claim an exemption from suit on the ground that the whole of the stock of the bank is the property of the State of Alabama ; that no individual is interested therein, and,

consequently, the suit against them, is a suit against one of the states of the Union, which is not sueable in the courts of a sister state. EASTERN DIST.
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The plaintiffs have victoriously relied on a case similar to this, in which the Supreme Court of the United States sanctioned the converse of this proposition. *Briscoe vs. Commonwealth Bank of Kentucky*, 11 Peters, 257. See, also, case of *Craig vs. The State of Missouri*, 4 Peters, 410.

II. On the second proposition the defendants relied on a decision of the Supreme Court of the state of New-York, in 16 *Johnson's Reports*, page 5, *McQueen vs. Middletown Manufacturing Company*, which fully supports them.

This case was decided nearly a quarter of a century ago. The great increase of banking institutions, insurance companies, and other corporations, and the numerous relations between themselves and individuals, has wrought a great change in the jurisprudence of these states with regard to their right of standing in judgment, and that of their creditors to prosecute them.

The Supreme Court of the state of Pennsylvania held, that a foreign attachment lies against a corporation incorporated by the laws of another state. *Bushell vs. The Commonwealth Insurance Company*, 15 *Sargeant and Rawle*, 172. See, also, *Code of Practice*, 241. Such a body cannot be brought before the courts of the state, by a citation, served personally, or left at their domicile; they must, consequently, be sued by the process of attachment, or the service of citation made on a curator appointed to them, which are the only two modes known to our laws, by which persons who reside out of the state can be made amenable to our courts. *Louisiana Code*, 57.; *Code of Practice*, 116; *George vs. Fitzgerald*, 12 *Louisiana Reports*, 604.

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A corporation, or bank in which the stock is entirely owned by another state, and created by its laws, may be sued in the courts of this state.

An attachment lies against the property of a corporation, incorporated by the laws of another state.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

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RIO *vs.* GORDON ET AL.

RIO
vs.
GORDON ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Immaterial amendments, even if erroneously allowed or rejected by the court *a qua*, where they cause no injury or prejudice to the party, will not be allowed to interfere with the judgment, or cause its reversal in this court.

Where the appellant may reasonably have had doubts of the correctness of the judgment below, he will not be condemned to pay damages as for a frivolous appeal.

This is an action against the maker and endorser of two promissory notes. The notes are protested and annexed to the petition for reference.

The defendants severed in their answers. The maker of the note excepted, and denied that the plaintiff was the owner of the notes, or had a right to receive payment. On the merits, he denies having signed the notes sued on. The endorser pleaded the same exceptions, and other matters of defence set up in the answer of his co-defendant. The plaintiff, on leave, amended his petition, to correct an error in setting out the date of the notes, changing the dates from 1837 to 1838, which was excepted to.

The defendants also filed a supplemental answer, which was stricken out on the trial. The defendants' counsel excepted.

There was judgment for the plaintiff, and the defendants appealed.

I. W. Smith, for the plaintiff, insisted that all the amendments and errors stated were immaterial.

M. Henry, for the appellants, urged several errors in the proceedings, and also the matters excepted to in relation to the amendments.

Morphy, J., delivered the opinion of the court.

The defendants are sued on two promissory notes, drawn by one of them to the order of, and endorsed by the other.

They denied having signed notes such as those set forth in the petition. When the trial came on, the plaintiff's counsel moved the court for leave to correct an error in his petition, which described the notes as executed in 1837 instead of 1838. This was permitted by the court on the ground that the amendment was immaterial, the notes and protests having been annexed to the petition for reference. To this opinion the defendants excepted. We think that this decision, even if erroneous, caused no prejudice to defendants, for we are satisfied that had the amendment not been allowed, the defendants could not have resisted the introduction of the notes in evidence. It is shown that they had full notice that they were to be sued on those very notes; and that, therefore, they would be introduced and relied on. The defendants next complain that an amended answer filed by them was improperly stricken out. It appears, that owing to the rapidity with which business proceeds in the court below, the amended answer although filed on the very next day after the original one, came in after the cause was set for trial. Under other circumstances the defendants might perhaps, have been relieved, but here we think the judge was correct, because this amended answer was not only untimely, but alleged no new fact, created no new issue, and was intended only to repair the omission of an affidavit in the original answer, with a view to obtain a trial by jury. The merits of the defence, set up in the first answer, have already been considered and found to contain nothing. Damages are prayed for by appellee, but we do not think this a proper case to allow any, because the defendants may have had some doubts on the correctness of the opinions to which they excepted; and besides they are already bound to pay eight per cent. per annum.

It is, therefore, ordered, adjudged and decreed, that the judgment below be affirmed, with costs.

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GORDON ET AL.

Where the appellant may reasonably have had doubts of the correctness of the judgment below, he will not be condemned to pay damages as for a frivolous appeal.

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MARTIN vs. M'MASTERS.

MARTIN
vs.
M'MASTERS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An exception to the suit, alleging that the plaintiff has shown no cause of action, must be first considered independently of any other matter of defence.

The transferee of a note, *not endorsed*, but transferred by a special assignment of the payee, written on the back of it, cannot maintain an action against the transferor. He has no recourse on the transferor when the *debt exists at the time* of the transfer.

Where the transferor of a note obtained the temporary possession of it, and tortiously added the words, "without recourse" to the written transfer, as it did not alter the legal rights of the parties, the Court is not bound to notice it.

This is an action by the transferee against the transferor of the following promissory note, in which the former seeks to recover the amount :

"\$1,000. NEW ORLEANS, 16th March, 1837."

"Ten days after date, without grace, I promise to pay to the order of James M'Masters, one thousand dollars, value received. This note bearing interest at maturity at one-half per cent per diem until paid."

"JAMES ROUTH."

Written on the back : "For value received, I transfer this note to Mr. J. C. Martin, May 17th, 1837," "*without recourse*."

"JAMES M'MASTERS."

The plaintiff alleges that the defendant transferred this note to him for value received, which transfer was endorsed on the back of said note, your petitioner having paid said M'Masters the sum of one thousand one hundred and fifty dollars therefor.

He further alleges, that a few days after the transfer, he was asked by the defendant for the possession of the note, who informed him at the time that it would be paid, but with the view of defrauding and cheating him while the note was in

his possession, did secretly and without authority write and add the words "without recourse," to the said assignment, which act is punishable as a penal offence by law.

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He therefore prays that the defendant be arrested and condemned to pay the amount of said note and interest.

MARTIN
VS.
H'MASTERS.

The defendant, for answer, averred that by the plaintiff's own showing he has no cause of action. And should the court decide against this respondent, for further answer, he says, he delivered said note to the plaintiff, who, in consideration, gave him three notes on one Slocum, and he paid to plaintiff two hundred and fifty dollars in cash as the difference. That at the time, it was understood between them that the note of Routh was transferred to the plaintiff without any recourse on him in the event of non-payment; and if it was not paid, it was to be delivered up, Slocum's three notes returned, and the two hundred and fifty dollars in cash refunded to him. That it was further agreed the note should not be negotiated; but in violation of this, the plaintiff attempted to negotiate it, when this respondent demanded the note from the plaintiff, and wrote the words "without recourse," because that was the agreement between them; never intending himself to be responsible for the amount of the note. He avers, he has offered and now tenders Slocum's notes, on the plaintiff returning to him this one, and refunding the two hundred and fifty dollars paid in cash. He prays judgment in his favor.

Upon these pleadings and issues, the cause was tried. There was testimony taken, and evidence offered, to establish the facts set up in the answer.

The district judge, however, considered the transfer as having been made for a valuable consideration, and that the defendant was liable; and the words "without recourse," as not having been written by the defendant, even supposing he may have imagined he had a right to add them.

He further remarked, that the judgment would be in the alternative if the answer enabled him to designate the three notes averred to have been given in exchange for the one sued on; but as this was not the case, judgment must be

EASTERN DIST. given for the plaintiff, for the amount of the note transferred
February, 1840. and shown not to have been paid. From this judgment the
defendant appealed.

MARTIN
VS.
M'MASTERS.

Jones, for the plaintiff.

Lockett and Micou, contra.

Martin, J., delivered the opinion of the court.

The plaintiff alleges, that the defendant transferred to him a note of one Francis Routh, over due for one thousand dollars, and afterwards prevailed on him to trust him, the defendant, with the note, and while it was in his possession he wrote the words "without recourse," at the end of the transfer, without the authority or consent of him, the plaintiff.

The answer avers that the plaintiff, from his own showing, has no cause of action, and in case this exception be overruled by the court, the answer states certain facts as matters of defence.

The court gave judgment against the defendant, being evidently of opinion that the plaintiff had shown a cause of action which was not impaired by the facts pleaded in the answer as matters of defence.

It appears to us that the court erred. The defendant's exception was one of those which are called peremptory of the *suit*, but not of the *action*. If it prevail, it did not impair the action, *id est*, the *right* of bringing another *suit*. *Code of Practice*, article 1. But it destroyed or abated the suit, *id est*, the means to which the plaintiff had resorted to avail himself of his action, leaving him at liberty to pursue his remedy in another suit. The defendant, therefore, had an incontestible right to have his exception considered, independently of any other matter of defence. The *Code of Practice*, article 336, expressly requires the defendant to plead in his answer "all the dilatory or peremptory exceptions on which he intends to rely," except as relates to declinatory exceptions. This is done under an implied *protestando* that they are not to be used if the exceptions which are peremptory of the suit prevail.

An exception to the suit, alleging that the plaintiff has shown no cause of action, must be first considered, independently of any other matter of defence.

In this case, the *protestando* is express, "*if the court should decide that said plaintiff has a cause of action.*" This leads us to an examination of the first exception :

It is, that the petition shows no cause of action.

The plaintiff sues on a note *not endorsed*, but *transferred*, to him by the defendant. The petition does not deny that the amount of the note was due to the defendant at the time of the transfer. The transferee has no recourse on the transferor, when the debt exists at the time of the transfer. *Louisiana Code*, 2616. The solvency of the debtor at the time of the transfer, nor since, is not warranted, unless it be so expressly agreed. *Idem.*, 2617.

In the present case, the solvency of the debtor is not denied in the petition. It is, therefore, clear that the plaintiff had not, under his contract of transfer, any recourse against the defendant.

The petition shows no ground of action *ex contractu* ; one is attempted to be shown *ex delicto*. It is, that the defendant, having been entrusted with the note, tortiously added the words "without recourse," to the transfer on the back of the note.

We have said that the transfer was made to the plaintiff without any recourse on the defendant, resulting from the agreement of the parties, or the law ; so no injury was done to the plaintiff by the addition of the words "*without recourse*" to the transfer written on the back of the note. The District Court was called upon to test the *legal rights* of the plaintiff, but not the morality or propriety of the defendant's conduct.

The conclusion we have come to, renders it unnecessary to examine the matters pleaded in the defence on the merits.

It is, therefore, ordered, adjudged and decreed, that there be judgment for the defendant as in case of non-suit ; the plaintiff and appellee paying costs in both courts.

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February, 1840.

MARTIN

VS.

M'MASTERS.

The transferee of a note, *not endorsed*, but transferred by a special assignment of the payee, written on the back of it, cannot maintain an action against the transferor. He has no recourse on the transferor when the debt exists at the time of the transfer.

Where the transferor of a note obtained the temporary possession of it, and tortiously added the words "without recourse," to the written transfer, as it did not alter the legal rights of the parties, the court is not bound to notice it.

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February, 1840.

MORTON vs. CROSBY ET AL.

MORTON
vs.
CROSBY ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

A sale of slaves by authentic act duly registered, where possession is given in the deed and the knowledge of the contract brought home to creditors, cannot be attacked as fraudulent, and inquired into collaterally by a seizing creditor. It can only be set aside by a revocatory action.

The plaintiff alleges, that he purchased six slaves from John H. B. Morton by notarial act, passed the 25th June, 1838, which was duly registered in the office of the Register of Conveyances in New-Orleans, the 29th day of the same month. That on the 10th of August following, F. Buisson, then sheriff of the parish of New-Orleans, seized said slaves in the suit of J. Crosby against J. H. B. Morton and others, and illegally divested him (the petitioner) of the possession, and forcibly detains them, being induced thereto by the said John Crosby. He further alleges, that by their illegal acts they have caused him injury and damage to the amount of one thousand dollars. He annexes his act of sale, and prays judgment for the delivery of said slaves and damages.

The defendant, Buisson, pleaded a general denial, and averred that he made the seizure and took possession of said slaves under an execution issued on a judgment in favor of J. Crosby against Morton and Patterson, and by the direction of said Crosby.

He denies that the plaintiff, Henry E. Morton, is the lawful owner, or has been in possession of said slaves, and that the pretended act of sale under which he claims them, is fraudulent and collusive between him and J. H. B. Morton, and entered into for the sole purpose of defrauding the just creditors of the latter.

Crosby answered by a general denial, and justified his seizure under a judgment he obtained against J. H. B. Morton, the 19th June, 1838, for eleven thousand dollars, who is the brother of the present plaintiff; that the plaintiff was

never in possession, having lately come to this state, and acting as a clerk to his brother J. H. B. Morton. He alleges, the sale was made with a full knowledge of his judgment, which was duly recorded; that said sale is simulated, fraudulent and collusive, and can have no effect as to creditors of the vendor and third persons. He denies that he has occasioned the plaintiff any damage, and prays that the sale set up be declared null and void, and that he be allowed to proceed with his seizure.

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MORTON
vs.
CROSBY ET AL.

Upon these pleadings and issues the cause was tried.

On the trial, the district judge admitted parole evidence, to show that the vendor had, in fact, always remained in the possession of the slaves in contest; but restricted its application to the claim for damages.

The defendant's counsel objected to the act of sale to the plaintiff as fraudulent and collusive, and offered his judgment, mortgage and other testimony in support of his claim, as it was shown the plaintiff had never been in possession of the negroes. The court admitted the act of sale to be read in evidence, so far as related to the damages, and expressly said that it could only be set aside by a direct revocatory action. It rejected the defendant's testimony for any other object than to repel the claim for damages. The defendant excepted to the opinion of the court. It was shown that Crosby knew of the sale to Morton before his seizure. There was judgment in favor of the plaintiff, giving him the possession of the slaves, from which the defendant, Crosby, appealed.

Preston, for the plaintiff, contended, that Crosby was apprized of the sale before his seizure, and that the slaves were put in possession of J. H. B. Morton, for a short time only, while the plaintiff was absent from the state. The seizure was therefore illegal, the seizing creditors knowing these facts.

2. The sale cannot be attacked collaterally; the only remedy is by a direct action of nullity. *Louisiana Code*, 1964-5-6.

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February, 1840.

MORTON
VS.
CROSBY ET AL.

L. C. Duncan, for the defendant, insisted that the defendants' evidence should have been received, to prove the fraud of the plaintiff. It was competent to do this, and to disregard the sale as fraudulent and collusive, and as giving no title whatever. See case of *Weeks vs. Flower*. 9 *La. Reports*, 379.

Bullard, J., delivered the opinion of the court.

This action was instituted to recover possession of certain slaves, alleged to be the property of the plaintiff, which had been levied upon by one of the defendants, then sheriff, under an execution issued upon a judgment against the plaintiff's vendors. The plaintiff exhibited an authentic sale, and duly registered in the office of the Register of Conveyances. The defence set up by the seizing creditor of the plaintiff's vendor is, that the sale was simulated, collusive and fraudulent. That in fact no possession was ever given, and that the whole was intended to defraud the creditors of the vendor.

At the trial, the defendants offered evidence to prove that the sale to the plaintiff was fraudulent and collusive; that the plaintiff had never been in possession of the slaves. This was objected to, on the ground that the sale annexed to the plaintiff's petition could only be set aside by a revocatory action, and it was admitted that the defendant knew of the conveyance before the seizure. The court refused to admit the evidence, except to repel the claim for damages; but which, in fact, the plaintiff had waived, and the defendant took a bill of exceptions.

The general rule recognized by this court is not contested, to wit: that when a purchaser is in possession under a conveyance, the question of fraud cannot be inquired into collaterally, commencing with a seizure; but the defendants' counsel endeavors to distinguish this case, and to bring it within the exception settled by the case of *Weeks vs Flower*, 9 *Louisiana Reports*, 375. In that case, one if not more of the acts of sale, was under private signature. The sale was of lands, slaves and household furniture, and might be said to be *omnium bonorum*, and the vendor continued to reside on the

place as usual. In the case now before the court, the sale is of slaves by authentic act, and possession given by the deed itself, and knowledge of the existence of the contract brought home to the seizing creditor. That case turned principally upon article 2417, of the Louisiana Code, which declares that a sale under private signature shall have effect against creditors, and third persons generally, only from the day on which such sale was registered in the office of a notary, and actual delivery. In the present case, the deed was registered in the office of the Register of Conveyances. We conclude, therefore, that the court did not err in refusing the evidence.

The judgment of the District Court is, therefore, affirmed with costs.

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February, 1840.

ADAMS,
SYNDIC, &c.
vs.
HALL.

A sale of slaves by authentic act, duly registered, where possession is given in the deed, and the knowledge of the contract brought home to creditors, cannot be attacked as fraudulent, and inquired into collaterally by a seizing creditor; it can only be set aside by a revocatory action.

ADAMS, SYNDIC, &c. vs. HALL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Judgment affirmed, with ten per cent. damages as a delay case.

This suit is against the maker of a promissory note, who put in the plea of the general issue, but made no defence.

There was judgment for the plaintiff, and the defendant appealed.

J. Slidell, for the plaintiff.

Benjamin, contra.

Morphy, J., delivered the opinion of the court.

The appellant having made no defence below on his note of hand, we consider his appeal as taken solely for delay, and grant the appellee's prayer for damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs and ten per cent. damages.

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BARNETT vs. MACOIN.

BARNETT
vs.
MACOIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

In a redhibitory action for the rescission of the sale of a slave, when the evidence leaves it doubtful whether the disease, of which the slave was afflicted, originated before or after the sale, and the jury find for the defendant, their verdict will not be disturbed.

This is a redhibitory action, in which the plaintiff seeks the rescission of the sale of a slave and to recover the price, on account of redhibitory diseases and vices.

The defendant denied, generally, the allegations, and averred that said slave had no redhibitory vice, as alleged, and that, as to disease, the plaintiff had her in his possession for about three months before the sale, and, consequently, must have been well acquainted with her state of health, and good or bad disposition and qualities, when he purchased. The disease alleged was dropsy, and the evidence left it doubtful when it originated, whether before or after the sale.

The cause was submitted to a jury, who found a verdict for the defendant ; and, after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

Benjamin, for the plaintiff.

Canon, contra.

Morphy, J., delivered the opinion of the court.

This is a redhibitory action. The petition charges that a negro woman purchased by plaintiff from defendant, was, at the time of, and previous to the sale, afflicted with a dangerous and incurable disease, to wit : the dropsy, and, moreover, that while in defendant's possession the slave had been guilty of a capital crime, to wit : an attempt to poison her mistress, the wife of defendant, but that said fact, which was well known to defendant, had been concealed from plaintiff.

The verdict of the jury in the court below went in favor of the defendant. Having failed in an effort to set it aside, the plaintiff appealed. EASTERN DIST.
February, 1840.

There has been a total failure of proof as to the second ground on which this action rests, to wit : the commission of any crime by the slave sold to plaintiff. The evidence shows, that at one time some suspicions were entertained against her by the inmates of defendant's house, but it shows at the same time that they were unfounded. The defendant could not have believed it his duty to impart such unjust suspicions to the plaintiff.

BARNETT
VS.
MACOIN.

As to the disease with which the slave is alleged to have been afflicted, the testimony of the physicians conclusively shows that this slave died of the dropsy about eleven months after she had been owned by the plaintiff ; but whether the disease originated before or after the sale, is by no means so clearly established. It is shown by the defendant that up to the time of the sale, the wench enjoyed apparently very good health, and, moreover, that she had been hired to the plaintiff, and had been living in his house for several months before he purchased her. In descanting on the nature and peculiarities of this disease, the physicians inform us that it sometimes progresses rapidly, and sometimes is very slow in its development, thus leaving it doubtful at what time it originated in this particular case. Nothing, then, makes it our duty to disturb the verdict obtained by the defendant. The jury very correctly gave him the benefit of the doubts they must have entertained on this essential point.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

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BOGERT & KNEELAND vs. DORSEY.

BOGERT
& KNEELAND
vs.
DORSEY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An agent or factor will not be made liable for loss on sales of the article consigned, if it appears from the evidence it was deteriorated when received, and that he acted with diligence and fidelity in the discharge of his trust.

This is an action to recover from the defendant two thousand two hundred dollars, with interest at seven per cent., being the balance due on an acceptance of four thousand dollars, for a draft drawn by the latter on the plaintiffs against a consignment of bacon hams, and which were sold at a loss.

The defendant pleaded a general denial. Under this issue, a mass of testimony was taken and offered by the plaintiffs and defendant, to show the condition of the bacon consigned, and the manner in which the plaintiffs discharged their duty as factors and agents in making sales. The case turns mainly on questions of fact, which were submitted to the jury to be decided on the evidence.

There was a verdict and judgment for the plaintiffs, from which the defendant appealed.

T. Slidell, for the plaintiffs.

G. B. Duncan, contra.

Morphy, J., delivered the opinion of the court.

The plaintiffs are commission merchants in New-York, and seek to recover two thousand two hundred dollars and fifty-four cents, the difference between the proceeds of a consignment of certain hogsheads of hams, made to them by defendant, and the amount paid by them on a bill drawn by defendant against said shipment. This claim is resisted, on the ground that through the plaintiffs' neglect and want of proper diligence in disposing of the hams, they remained on hand a long time, deteriorated, and were finally sold at a very heavy sacrifice. No particular instructions appear to have

been given by the defendant to his agents. The evidence shows that upon the arrival of the hams in New-York, in November, 1836, the plaintiffs employed brokers and auctioneers to make a sale of them; that the market being dull, they could succeed in selling part of the hams only, by retailing them in small lots at tolerable prices; that from time to time they apprised defendant of the difficulty they met with in disposing of their goods. The witnesses of defendant, on the other hand, testify that during that season hams were in good demand, and that large quantities of the article were sold at fair prices. The apparent contradiction in the evidence on this head, can be easily accounted for by the well-established facts that defendant's hams arrived in New-York when new hams were making their appearance in the market, which then became very dull for old hams; that several persons who had purchased some of the defendant's hams expressed great dissatisfaction as to their quality; one of them actually refused to receive forty tierces of them because, on examination, they were found to be tainted. From these facts, we cannot but draw the inference that these hams must have been kept on hand in this place too long before they were shipped to New-York, because, in that cold climate, it is altogether improbable that they had so deteriorated in a few months as to be almost valueless. If the plaintiffs, then, have not succeeded in selling these hams sooner, it appears to us to be owing, in a great measure, to the bad quality of the article, especially when it is considered that it was their interest to sell as soon as possible, to reimburse themselves the amount of defendant's draft which they had already paid. The impression, therefore, made on our minds by the whole testimony, coincides with that of the jury, who gave their verdict for the plaintiffs. We think that they were diligent in the discharge of their trust, and showed themselves anxious to do every thing in their power to promote the interest of their principal.

A bill of exceptions was taken to the Judge's refusal to charge the jury, that if from the evidence they believed that

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ROBERT
& KNEELAND
ATTORNEYS.
DORSEY.

EASTERN DIST. the plaintiffs were guilty of negligence in the discharge
February, 1840. of their obligations to the defendant, it was sufficient to
 render them liable in damages to the latter. From the
 reasons assigned by the judge for his refusal so to charge,
 we infer that he did not dissent from the position taken
 by defendant's counsel, but that he thought he had already
 in different terms sufficiently instructed the jury to the
 same effect. We have before us the charge itself, and do
 not think that its language could have misled the jury,
 although it should, perhaps, have been more pointed as to
 the liability created by the negligence of an agent.

HERRIES
VS.
BOTTS.

It is, therefore, ordered, that the judgment of the District
 Court be affirmed with costs.

HERRIES VS. BOTTS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE BUCHANAN PRESIDING.

A slave may appear perfectly healthy at the time of sale, and yet be
 afflicted with a redhibitory disease which renders her valueless, and
 does not come within the law providing for defects discoverable on
 simple inspection.

A disease, although not known at the time, which renders a slave so
 valueless that it must be supposed the owner would not have purchased
 her had he known it, is a redhibitory one which authorizes a rescission
 of the sale, and return of the price.

The plaintiff alleges, that he purchased a slave woman
 from the defendant with full guarantee, for the sum of seven
 hundred dollars in cash, and that since the purchase he
 discovered that she was afflicted and affected with redhibitory
 diseases and vices, which entitle him to the redhibitory

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action, and a return of the price. He sets out the defects, which are fully stated in the opinion of this court. EASTERN DIST.
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The defendant pleaded a general denial, and averred he purchased said slave of one Bass, whom he calls in warranty. Bass appeared, and denied his liability as warrantor.

HERRIES
VS.
BOTS.

The evidence of physicians and others showed, that said slave was afflicted with hernia, and incurable, rendering her almost valueless. The cause was submitted to two juries, and each time there was a verdict for the plaintiff, and for the defendant against his warrantor. The defendant appealed.

R. Hunt and Barton, for the plaintiff.

Preston and Larue, contra.

Morphy, J., delivered the opinion of the court.

This suit is to recover back from defendant the purchase money of a negro woman sold to the plaintiff. It is alleged, that the slave at the time of, and previous to the sale, was afflicted with a large hernia or rupture, a disease which renders her services so inconvenient and imperfect, that he would not have purchased the slave, had he known of its existence. The plaintiff is brought into this court as appellee, with two verdicts in his favor. A new trial, it appears, had been granted by the judge *a quo*, on the ground that the evidence had disclosed the defect complained of to be an apparent one, for which no action lies. On the second trial, the defendant gave in evidence the admission of the plaintiff's counsel, that when this slave was sold, she appeared to be a strong, healthy girl. This evidence seems to have been of signal advantage to the plaintiff. Its weight with the jury was such, that they gave their verdict for the plaintiff, this time, without leaving their seats. They, no doubt, concluded that the plaintiff, from this apparent state of healthiness, was deterred from making such a close examination of the girl as he might otherwise have done. The present does not appear to us to come within the cases provided for by

A slave may appear perfectly healthy at the time of sale, and yet be afflicted with a redhibitory disease which renders her valueless, and does not come within the law providing for defects discoverable on simple inspection.

EASTERN DIST. law, where defects are discoverable on simple inspection.
 February, 1840. *Louisiana Code, article 2497.* To discover this malady and ascertain its character, it required, independent of professional skill, a peculiar kind of examination which is not generally resorted to in relation to female slaves, unless some suspicion is raised by their looks and appearance. That such was not the case here, the defendant has taken the trouble of sufficiently proving for the plaintiff. As to the malady itself, and its character, the testimony is strong and conclusive. Several physicians examined, agree in describing it to be an *irreducible umbilical hernia*, subjecting the woman to the continual danger of strangulation, if, in doing her work, she lifts any weight, and greatly exposing her life in case of parturition. The defendant's counsel has contended that, notwithstanding all this, it was not a redhibitory disease, and that the jury were, no doubt, scared into their verdict by the very scientific terms used by these learned gentlemen of the medical profession. If such be the case, it is fortunate for the purposes of justice that they were frightened into the right path; but leaving aside technical names and definitions, the physicians declare, in substance, that the disease materially impairs the value of the slave, incapacitates her for any hard labor, and that she cannot even perform the household work, for which she was bought. We must, then, consider this disease as a redhibitory one, for it is not to be supposed that the plaintiff would have purchased her, had he known it. *Louisiana Code, article 2496.*

A disease, although not known at the time, which renders a slave so valueless, that it must be supposed the owner would not have purchased her had he known it, is a redhibitory one, which authorizes a rescission of the sale and return of the price.

HERRIES
 vs.
 BOTTS.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

BRIDGE ET AL. vs. BELLOW.

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February, 1840.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

BRIDGE ET AL.

vs.

BELLOW.

Where a judgment states that it is rendered on *due proof* of the allegations in plaintiffs' petition, in which the usual allegations are made, the reasons will be deemed sufficient.

A show of defence in this court, when none was seriously attempted below, will not protect the appellant from damages.

This is an action against the drawer and acceptor of a bill of exchange, made payable to the plaintiffs. They allege, that demand was made, and the bill duly protested for non-payment, of which the parties had due notice, who have since failed and refused to pay the same, although amicably requested thereto.

The defendants pleaded the general issue. The bill, protest and certificate of the notary, were produced in evidence. The defendants did not appear at the trial, although notice was served on their counsel.

The court rendered judgment for the plaintiffs, stating, as the reason, "that they had proved the allegations of their petition." The defendants appealed.

Hoffman, for the plaintiffs, insisted on the affirmance of the judgment, with the maximum of damages.

M'Millen, contra, urged that the judgment was unconstitutional and void, for want of *reasons*, and a reference to the law.

2. The case was not set for trial, as provided in the Code of Practice; but was fixed by the party, and notified only to the counsel of the defendants, who appear in all the proceedings as residents of the city. The judgment should be reversed.

Morphy, J., delivered the opinion of the court.

The defendants are sued, *in solido*, as the drawer and acceptor of a draft in favor of the plaintiffs. No defence was made below.

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 7M 440.446
 10M 55.162
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 3M 152.589
 6M 573
 7M 256
 10M 41
 11M 162.566
 12M 143.
 13M 12.96
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BRIDGE ET AL.
VS.
BELLOW.

In this court, the appellants have made two points, to wit:
1. That the judgment is unconstitutional and void, no law or reasons having been assigned for rendering it.

2. That all the proceedings on the trial were illegal and null, the case not having been set down regularly and in its turn, in conformity with the Code of Practice.

I. The judgment states, that it is rendered on due proof of the allegations of plaintiffs' petition, in which the usual averments of demand and notice are to be found ; this, we think, is sufficient ; it is, perhaps, all that ought to have been said. It has been held in this court, that the absence of a citation of a law, is not alone a ground for setting aside a judgment.

II. As to the second point, the rules and regulations of the court *a qua*, in relation to the manner of setting down causes, not being in evidence before us, we cannot judge whether they conform to, or violate the provisions of the Code of Practice. We are referred to a notice of trial served on defendants' counsel. This cannot be a reasonable subject of complaint. If such notice is not required by the code, it is a great convenience to counsel, and does by no means show that the cause has not been legally set down for trial.

The appellee has prayed for damages. We have already said, that a show of defence made here, when none has been seriously attempted below, should not protect the appellant from damages.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs and ten per cent. damages.

DELAVIGNE VS. ARNET.

EASTERN DIST.
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DELAVIGNE
VS.
ARNET.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The certificate of the notary who makes the protest, is *prima facie* evidence that due diligence was used to find the residence of the maker and endorser of a note, and that notice to the endorser was put in the post-office.

The nature and degree of diligence used to find the residence of the parties to a note, and make demand and give notice to the endorser, may be inquired into on the trial, to rebut the presumption arising from the notary's certificate. This presumption will, however, yield to contrary proof.

This is an action against the maker and endorser of two promissory notes.

The plaintiff alleges, that said notes were protested for non-payment, and refers to the notes and protests which are annexed. He prays for an attachment against Arnet, on the ground that he is about to leave the state, without leaving in it sufficient property to satisfy his demand.

The defendants pleaded a general denial.

The attachment was levied on a schooner, as the property of Arnet.

On the trial, the only evidence offered was the notes, protests and certificates of the notaries.

The certificates state, that "notices to Frederick Arnet, the endorser, was deposited in the post-office in New-Orleans, directed to him in that place, the notary not being able to find him after diligent inquiry from the other endorser and other persons."

Upon this evidence, there was judgment for the plaintiff against Robinson, the maker, and in favor of Arnet, the endorser. The plaintiff appealed.

Bodin, for the appellant, insisted that judgment should go against the endorser, on the evidence of the notarys' certi-

EASTERN DIST. ficates. They are evidence of notice to the endorser, the
February, 1840. notaries having complied with the act of 1827. See case of
Vigers et al. vs. Carlon, f. m. c. Ante 89.

DELAVIGNE

VS.

ARNET.

Grymes, contra.

Morphy, J., delivered the opinion of the court.

Arnet, one of the defendants, being sued as endorser of two promissory notes, drawn by his co-defendant, filed, for answer, a general denial. Judgment below having been rendered in his favor, the plaintiff has taken this appeal.

The demand on the drawer, and notice to this endorser, are proved by the certificates of the notaries who protested these notes, according to the act of 1827. This court has frequently held, that these certificates must be taken as *prima facie* evidence, that due diligence was used to find the residence of the drawer and endorser, and that the notice to the endorser was deposited in the post-office. The nature and degree of that diligence may be inquired into on the trial; and should it appear, in point of fact, that the notary did not use due diligence to procure the necessary information, then the presumption, arising from his official certificate, will yield to the contrary proof. Nothing here is shown, to rebut the concurrent declarations of the notaries that they made diligent inquiry at several public places, and of the other parties to the notes, and that both were unable to discover either of the defendants, or their residence. If they, or either of them, had a domicil in New-Orleans, it could easily have been shown. The circumstance of defendant having been cited personally, has been urged as a presumption that he was domiciliated in town.

The certificate of the notary who makes the protest is *prima facie* evidence that due diligence was used to find the residence of the maker and endorser of a note, and that notice to the endorser was put in the post-office.

The nature and degree of diligence used to find the residence of the parties to a note, and make demand and give notice to the endorser, may be inquired into on the trial, to rebut the presumption arising from the notary's certificate. This presumption will, however, yield to contrary proof.

It only proves the presence of the defendant at that particular time, and can prove nothing more, especially when we find in the record that an attachment issued against Arnet, on the ground that he was about to remove, with his property, from the state, and that this writ was served on the schooner "*Frederick Arnet.*" From this circumstance, it might perhaps, with more reason be inferred, that this individual

had no fixed domicil, and was, by trade, a sea-faring man; EASTERN DIST. February, 1840.
 but, be this as it may, no proof whatever was offered on the trial to rebut the *prima facie* evidence, resulting from the notaries' certificates. We think that the plaintiff was entitled to recover.

HYDE ET AL.
 VS.
 GOODRICH.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be reversed, and that the plaintiff do recover of Frederick Arnet the sum of eight hundred and fifty-one dollars and ten cents, with legal interest until paid, as follows, to wit: on four hundred and nineteen dollars and thirty cents from the fourth of September, one thousand eight hundred and thirty-eight, and on four hundred and thirty-one dollars and seventy-eight cents from the fourth of January, one thousand eight hundred and thirty-nine; together with costs in both courts.

HYDE ET AL. VS. GOODRICH.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

Where lessors received rent at a higher rate, after the annulment of the lease, they cannot be made to refund the difference, when it is not shown that the lessees did not consent to pay the higher rate by a new lease.

This is a proceeding against the surety in an appeal bond. The defendant became surety in an appeal for Palmer & Southmayd, at the suit of the present plaintiffs against them, for the annulment of a lease, and recovery of the rent due thereon.

The plaintiffs, in that suit, had judgment against Palmer & Southmayd, annulling the lease, and for possession of the

EASTERN DIST. premises the 15th November, 1837, and also for one hundred
February, 1840. and fifty dollars rent per month from the 1st March, 1836, to
the time of possession. This judgment was affirmed, on
HYDE ET AL. appeal.
VS.
GOODRICH.

The plaintiffs took a rule on Goodrich, the surety, in the appeal bond, to show cause why he should not pay the amount of said judgment.

In his answer to the rule, he denied his liability, and set up a claim, in compensation and reconvention, for eight hundred and sixteen dollars, which he averred was due by the plaintiffs to Palmer & Southmayd, being the difference of rent of the premises between one thousand eight hundred dollars and three thousand two hundred dollars per annum, from the 15th November, 1837, to 15th June, 1838, say seven months, making this surplus over one hundred and fifty dollars per month, and which the plaintiffs had received since the judgment. There was no evidence of this demand produced, except an account annexed. The plaintiffs admitted they took possession of the leased premises on the 15th November, 1837. There was judgment against the defendant on the rule, and he appealed.

I. W. Smith, for the appellant.

The surety has the same right as the original defendants to set up the defence here taken to the proceedings had against him on the bond. The defence relates purely to the debt. *Louisiana Code*, 3029.

The matters of fact here pleaded, did not exist at the rendition of the judgment. They were connected with the peculiar nature of the judgment, which was not for a sum certain, but for a monthly sum, to continue accumulating after the judgment, until an event, which could only be established by evidence *aliunde*. In such a case, the Code of Practice does not prohibit matters subsequent to the rendition, and closely connected with the judgment, from being pleaded in reconvention. *Code of Practice*, 375.

Micou, contra.

Bullard, J., delivered the opinion of the court.

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The plaintiffs having recovered a judgment against Palmer & Southmayd, annulling a lease, and for one hundred and fifty dollars per month rent from the 1st day of March, 1836, until possession should be delivered, in pursuance of such judgment, the latter appealed, and gave Goodrich, the present appellant, as surety on the appeal bond; and the judgment having been affirmed in this court, a *fi. fa.* issued, upon which, there being a return of *nulla bona*, the plaintiffs took a rule upon the surety, to show cause why he should not be condemned to pay the amount of the judgment.

HIDE ET AL.
VS.
GOODRICH.

The appellant, Goodrich, in answer to the rule, sets up in reconvention, or compensation, a sum of about eight hundred dollars, being the difference of rent for the tenement between eighteen hundred dollars and three thousand two hundred dollars per annum, from November 15, 1837, until June 15, 1838, due to Palmer & Southmayd, and received by the plaintiffs since the judgment.

Without considering how far the surety may plead a matter of this kind, we will remark, that the charge of additional rent received by the lessors, pre-supposes that they were in possession when the new lease was made, under which they received a higher rent, and that would imply the consent of the former lessees, to wit, Palmer & Southmayd. The date from which the additional rent, said to have been received by the lessors, is charged, corresponds with that at which the premises are admitted by the plaintiffs to have been surrendered. No agreement is shown, on the part of the plaintiffs, to account to the defendants for a higher rate of rent, and we are left to the presumptions arising from the circumstances of the case. It seems to us more probable, that the lessees, whose lease had been annulled, should have surrendered the property unconditionally, than that the owners should come under any agreement to account to Palmer & Southmayd for any excess of rent over one hundred and fifty dollars per month. If it had been rented for a less sum, would the loss have fallen on the former lessees? There is nothing in

EASTERN DIST. the record to show that such was the understanding of the
February, 1840. parties.

M'ALLISTER
vs.
SRODES.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

M'ALLISTER vs. SRODES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

An agent receiving drafts, and engaging to make title as soon as he collected them, undertakes to present them for payment, and account to the other party for them, or show that one or more of them remained unpaid, before he is exonerated from his obligation.

An agent is bound to administer proof of his performance of the obligation resulting from his agency.

The plaintiff alleges, that the defendant, by a written agreement, dated the 20th July, 1836, bound himself to convey one-eighth of the steamer *Moravian* to one J. C. Dunn, for the sum of four thousand three hundred and seventy-five dollars, who delivered him two drafts drawn on petitioner for two thousand dollars each, and one for one thousand six hundred dollars on one Wm. Lape, of Rodney, Mississippi; that Dunn transferred to petitioner, by endorsement on the back of said agreement, all his interest therein, and that the defendant bound himself to convey to Dunn, or his assigns, a complete title to one-eighth of said steam-boat, whenever said drafts were paid.

The plaintiff further shows, that he has paid the two drafts drawn on him, and alleges, that the third one is also paid, and that the defendant has failed to convey the title in said steam-boat to him, as the assignee of Dunn, and

to pay him his share of the profits accrued since the transfer. He prays that the sum of four thousand three hundred and seventy-five dollars be refunded to him with interest, or that the defendant be required to convey the title of one-eighth part of said boat, and to account for the profits received on the same, or in default, that he be condemned to pay him four thousand nine hundred dollars in damages.

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M'ALLISTER

VS.

SHODES.

The defendant pleaded a general denial.

On the trial, the plaintiff exhibited the two drafts which he had paid, and offered to pay the three hundred and seventy-five dollars balance, if it appeared the defendant, Srodes, had not collected the third draft of one thousand six hundred dollars. It was not shown that this draft was, or was not paid, nor was it accounted for.

The District Court decided that the obligation of the defendant to convey title, depended on a suspensive condition, which had not been accomplished. There was judgment for the defendant, and the plaintiff appealed.

L. Janin, for the plaintiff and appellant, insisted :

1. It was the defendant's duty to account for Lape's draft, not the plaintiff's. A party is always required to prove those facts, of which he is particularly cognizant.

2. The plaintiff offered to pay into court the three hundred and seventy-five dollars, wanting to perfect the payment, with the four thousand dollars described in the petition, and ought to have been allowed to do so, and to have obtained judgment in his favor, on making this payment.

Chinn, contra.

Martin, J., delivered the opinion of the court.

The plaintiff seeks to recover from the defendant the sum of four thousand three hundred and seventy-five dollars, with interest, which he alleges to be in the hands of the defendant, as the price of one-eighth undivided part of the steam-boat Moravian, which the defendant had undertaken to convey to him, or to obtain its conveyance.

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M'ALLISTER

VS.

RHODES.

The defendant pleaded the general issue.

The court was of opinion, that the defendant's obligation to pay depended on a suspensive condition, the happening of which was not proved, and non-suited the plaintiff, on the ground that he should have administered proof of the facts on which the obligation was to become absolute. The plaintiff appealed.

The consideration of the sale was the sum of four thousand three hundred and seventy-five dollars, and the plaintiff handed over three drafts, amounting to five thousand six hundred dollars, on the defendant's promise to convey title as soon as he had collected the consideration of the sale, and to pay over the balance. It was shown, that two of the drafts, amounting to four thousand dollars, were paid, and the only question presented for our solution, relates to the error in which the appellant's counsel contends the District Court fell into, in requiring him to administer proof of the payment of the third draft, or so much thereof as was necessary to complete the consideration money, to wit: the sum of three hundred and seventy-five dollars.

An agent receiving drafts, and engaging to make title as soon as he collected them, undertakes to present them for payment, and to account to the other party for them, or show that one or more of them remained unpaid, before he is exonerated from his obligation.

An agent is bound to administer proof of his performance of the obligation resulting from his agency.

It appears to us that the district judge erred. The defendant, in receiving those drafts, and engaging to make title as soon as he collected and received the consideration of the sale, certainly undertook to do what was necessary, that is, to present them for payment. He is, therefore, bound to show that he did so unsuccessfully. If that was the case, the draft must be still in his possession, and the production of it is the first step in repelling the plaintiff's claim. He was the plaintiff's agent, *ad hoc*, and is bound to administer proof of his performance of the obligation resulting from his agency. The plaintiff could not be called on for this proof, which cannot be supposed to be within his reach.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, the non-suit set aside, and that the case be remanded for further proceedings according to law, the appellee paying the costs of this appeal.

HILL & M'GUNNEGLE vs. BOWMAN.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE BUCHANAN PRESIDING.

HILL
& M'GUNNEGLE
vs.
BOWMAN.

The judgment alone of this court must have effect, and is the law, independently of any expression used *arguendo*.

A judgment, allowing part of the demand as an *ordinary debt*, is in *personam*, although the suit was, by attachment, for a privileged debt.

So, in a suit by attachment, the judgment is *in rem*, and *in personam* for the balance not covered by the property attached, on which a writ of *ca. sa.* may issue.

The defendant is appellant from a judgment discharging a rule, taken by him on the plaintiffs, to show cause why a writ of *ca. sa.*, which they had caused to be issued against him, should not be set aside.

The original suit was brought by attachment of a steam-boat, of which the defendant was part owner. He never appeared, and was represented by an attorney, appointed by the court. The plaintiffs had judgment, allowing their whole claim, but only part of it as a privileged one; and it concludes by saying, "they have not shown themselves entitled to a privilege for the balance of their accounts, *but it is allowed as an ordinary debt.*"

The proceeds of the steam-boat, not proving sufficient to pay the entire judgment, the defendant, on coming to the city, was taken on a writ of *ca. sa.*, which issued in pursuance of this judgment.

The district judge discharged the rule on hearing the parties, from which the defendant appealed.

Grymes and Benham, for the appellant.

Duncan, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment, rejecting his claim to a discharge from imprisonment under a *ca. sa.*, issued

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in execution of a judgment of the District Court for the first judicial district, affirmed on appeal by a judgment of this court. See 1 *Louisiana Reports*, 543.

His counsel has contended, that the writ of *ca. sa.* ought to be quashed, because it issued on a judgment which had no other object, and ought not to have any other effect than to settle the relative rank and privileges of the claimants on the steam-boat Oregon, (or its proceeds) of which the appellant was part owner. It is further urged, that the suit on which judgment was given, was instituted by writ of attachment, the appellant and his co-owners being non-residents; that he did not appear in the suit, and that he was not otherwise represented than by an attorney, appointed by the court, to protect, as he contends, the property attached.

I. The first point is, whether judgment be in *personam*. To show that it is not, we have been referred to our judgment in confirmation, in which we say, "the District Court has acted *only* on the privileges resulting from the nature of the claims." The district judge, in the judgment now appealed from, has thought otherwise.

The judgment alone of this court must have effect, and is the law, independently of any expression used *arguendo*.

A judgment allowing part of the demand as an *ordinary debt* is in *personam*, although the suit was by attachment for a privileged debt.

The original judgment affirmed by us absolutely, must have its effect, independently of any expression used by this court, *arguendo*, in affirming it. It contains these words: "They (plaintiffs) have shown themselves entitled to a privilege for the balance of their account, *but it is allowed as an ordinary debt.*" The district judge has, therefore, correctly concluded, that this allowance of a part of the plaintiff's claim, without a privilege, was a judgment therefor against the defendant in *personam*.

II. The second point is, whether proceedings by attachment are purely *in rem*, or in *personam* also. On this part of his defence, the defendant is supported by the authority of Judge Story, who says, that such proceedings are "to be treated, to all intents and purposes, as if the defendant has never appeared and contested the suit, as a mere proceeding *in rem*, and not personally binding on the party as a decree or judgment in *personam*." *Story's Conflict of Laws*, section 549. Judge Kent cites the case of *Mayhew vs. Thatcher*,

6 Wheaton, 129, in which, he says, the Supreme Court of the United States "seem to imply that a judgment in one state, founded on an attachment *in rem*, would not be conclusive evidence of the debt in other states, if the defendant had not personal notice of the suit, so as to enable him to defend it." 1 *Kent's Commentaries*, 262.

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This case, however, must be decided by our own codes. Our legislature has considered all persons, whether they were ever in this state or not, as amenable to our courts. The Louisiana Code, article 57, provides, that if a suit be instituted against an absentee who has no known agent in the state, or for the administration of whose property no curator has been appointed, the judge, before whom the suit is pending, shall appoint a curator, *ad hoc*, to defend the *absentee* in the suit." We have, also, a legislative definition of the word "absentee." "It includes persons who never were in the state, as well as those who, having resided in it, have removed from it." *Louisiana Code*, 3522, No. 3.

In the case of *George vs. Fitzgerald*, 12 Louisiana Reports, 604, we recognized the application of the word "absentee" to a defendant never having resided in the state. It is, therefore, clear, that our law recognizes the liability of defendants being brought into court without personal citation, or one at domicile by service of a citation, on a person appointed by the court to represent such defendant.

In a suit by attachment, the seizure of the defendant's property must soon be known to the person who had the care of it, and it is not probable that he will conceal it from the owner. Besides this, the law requires a citation to be served on the defendant, if possible. If this cannot be done, citations are to be posted up. If the defendant does not appear, the court must appoint an attorney to represent him, and defend the suit, on whom service of the petition is to be made. *Code of Practice*, article 256, 260. "Reasonable delay is to be given to such attorney to enable him to communicate with the party he represents." *Idem.*, 260.

In the case of service of citation on a curator, the proceedings cannot be *in rem*, and must necessarily be in

So, in a suit by attachment, the judgment is *in rem*, and in *personam* for the balance not covered by the property attached, on which a writ of *ca. sa.* may issue.

EASTERN DIST. *personam*. In that of attachment, the law has taken much greater care to afford notice of the suit to the defendant, and it cannot be presumed that it intended a less security to the plaintiff.

ABAT
VS.
WILTZ.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ABAT VS. WILTZ.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The appeal considered as frivolous, and judgment affirmed, with ten per cent. damages.

This is an action against the maker, on several of his promissory notes, endorsed in blank by the payee. The defendant admitted his signature, but denied that he was indebted to the plaintiff, and that he was not the legal holder of the notes, but that they belonged to L. Millaudon, against whom he might have and had a good defence. He propounded interrogatories to the plaintiff, if he had not said he was not the owner, but that Millaudon was the owner of said notes. The plaintiff took no notice of them.

On the trial, the defendant offered Millaudon as a witness, to make out his defence set up in the answer, which was objected to, on the ground that such a defence would avail nothing. The court sustained the objection, and the defendant excepted.

There was judgment for the plaintiff, and the defendant appealed.

Benjamin, for plaintiff, prayed the affirmance of the judgment, with ten per cent. damages.

Canon, contra.

Morphy, J., delivered the opinion of the court :

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The defendant being sued as drawer of several notes, answers, that plaintiff has no interest in them ; that they belong to Laurent Millaudon, against whom he has a good defence. Plaintiff's silence, on the interrogatories put to him to prove his want of interest, authorized defendant to make out any just defence he might have had against Millaudon ; this he has not done. Appellee prays for damages on the ground that this appeal is frivolous and taken for delay ; we cannot but view it in the same light.

SHEETS & GROVER
VS.
CULVER ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment below be affirmed, with costs and ten per cent. damages.

SHEETS & GROVER VS. CULVER ET AL.

PHILLIPS, GARNISHEE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE BUCHANAN PRESIDING.

Negotiable notes cannot be attached in the hands of the *maker*, after they are put in circulation. It can only be done, by either seizing the notes, or attaching them in the hands of a *holder*, as the property of the debtor.

This suit commenced by attachment. The plaintiffs allege, that the defendants, W. D. Culver and C. C. Rhodes, are indebted to them in the sum of seven hundred and sixty-eight dollars, on their note given to Howard & Emmerson, for work done on the steam-boat Clinton, at Madison, Indiana, the laws of which state give a lien or privilege on the boat ; that said due-bill, or note, has been transferred to them, by endorsement, together with the lien,

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or privilege attaching thereto; that said boat has since been sold to J. M. Phillips, who resides in this state, and who is indebted to the defendants for the amount of the purchase money.

They further show, that the defendants reside out of the state, and pray for an attachment against Phillips, and that the money due by him to the defendants, be seized to satisfy their demand. They propound interrogatories to Phillips, requiring him to answer touching amount in his hands, due to the defendants, and citing him as garnishee.

Phillips answered, in substance, that he had paid part in cash, and given his negotiable notes for the balance of the price of said boat, and that he did not know in whose hands they were.

There was judgment against the defendants. The plaintiffs took a rule on the garnishee, to show cause why he should not pay the amount of their judgment. The garnishee resisted the rule. The district judge was of opinion there was not any property of the defendants shown to have been attached in the hands of the garnishee, and gave judgment in his favor, from which the plaintiffs appealed.

Clarke and Eggleston, for the plaintiffs and appellants, insisted that the garnishee was liable to them, unless he showed a transfer, as he admits the notes were outstanding and unpaid at the time the attachment was served. 9 *Martin's Reports*, 405.

2. But, admitting the notes had been transferred before the attachment was levied, yet an attaching creditor would prevail over the transferee, who had not given notice of the transfer to the debtor, before service of the attachment. *Louisiana Code*, 2613; 4 *Martin, N. S.*, 56; 8 *Idem.*, 213; 5 *Idem.*, 21; 4 *Idem.*, 562; 6 *Idem.*, 332; 2 *Louisiana Reports*, 424-5; 8 *Idem.*, 153, 160, 270.

3. Phillips, the garnishee, admits his indebtedness to Rhodes, one of the defendants, and he has offered no evidence to show the payment or transfer of any of these obligations.

Maybin, for the appellee.

Morphy, J., delivered the opinion of the court.

This suit commenced by attachment. The plaintiffs, having obtained a judgment against William D. Culver, one of the defendants, took a rule against the garnishee, John M. Phillips, to show cause why he should not pay the amount of said judgment, out of said defendant's property, attached in his hands. The garnishee, in answer to this rule, averred, that nothing belonging to William D. Culver had ever been attached in his hands, and denied being indebted, in any way, to said defendant.

To judge of the liability of this garnishee, it will be necessary to notice such parts of his answers to plaintiffs' interrogatories as may be material to the view we have taken of this case. These answers were filed on the 9th of July, 1838. He "declares, that on the 2d of April preceding, he purchased, jointly with one C. C. Rhodes, the steam-boat Clinton, from Louisa D. Culver, assisted by her husband, the defendant in this suit, and one James Knowles, for the sum of ten thousand five hundred dollars; that he and his co-purchaser paid three thousand dollars in cash, and for the balance, gave their notes, part of them drawn by himself, and endorsed in blank by Rhodes, and part drawn by Rhodes, and endorsed by himself in blank, payable at six, twelve and eighteen months, at the Atchafalaya Bank, in this city; that he held himself justly indebted to the holder or holders of his notes, but that he was unable to say who were the holders."

The opinion we have formed as to the absence of any liability on the part of the garnishee under these answers, renders it unnecessary for us to notice a question raised in relation to the rights of a husband over the personal property of his wife, under the common law, which is admitted to prevail in Kentucky, the domicile of these parties.

Our Code of Practice, (article 246, *et seq.*) points out the manner of attaching rights and credits belonging to a debtor, in the hands of a third person. It provides, that such third

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Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation. It can only be done by either seizing the notes, or attaching them in the hands of a holder, as the property of the debtor.

person may be cited to declare, on oath, what property belonging to defendant he has in his possession, or in what sum he is indebted to such defendant. It is evident, that negotiable notes, from their very nature, can be attached but in two ways, to wit: by actual seizure of the notes themselves, or by attachment in the hands of a person holding them, as the property of the debtor. In this case, negotiable paper, supposed to belong to defendant, is attempted to be attached by interrogatories propounded to the maker, and upon the latter answering that he does not know by whom his notes are held, he is sought to be made liable as if he had actually declared himself indebted to defendant. Untenable as such a position would seem to be, an effort has been made to support it by argument. It is said that the attachment was laid in garnishee's hands before he had notice of the transfer of his notes, and a series of decisions of this court have been cited by the counsel for the appellants, to show that the transferee of a debt is only possessed as it regards third persons, after notice has been given to the debtor, of the transfer having been made; than this, there is, perhaps, no principle of our laws better settled; but it obviously applies only to credits not in a negotiable form.

As to notes endorsed in blank, which circulate and pass, from hand to hand by mere delivery, it has never been, nor can it be pretended, that any notice of transfer is necessary. *Louisiana Code*, 3128.

If, then, no such notice is ever given, how is a garnishee, who has issued his promissory note, endorsed in blank, to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? and if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it, could such a proceeding restrain its negotiability? Could it affect the rights of a *bona fide* holder? Surely not. The ownership of negotiable paper is incessantly varying, before its maturity, and the obligation of the maker of such instruments is not to pay to any particular person, but to the holder, at maturity, whoever he may be. Thus, it is obvious, that the

garnishee, in this case, could give no other answer than that he has made, and it is equally obvious, that by pursuing this course, the plaintiffs have attached no property out of which their judgment can be satisfied.

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HUBBARD ET AL.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HUBBARD ET AL. VS. HOBSON ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action to annul a transfer of certain notes alleged to be made on the eve of insolvency, and in fraud of the seizing creditors, it must be shown to the satisfaction of the court, that the debtor was insolvent at the time of the transfer, or that the defendants knew of his insolvency.

The plaintiffs had judgment against one Walley, for eight hundred and thirty-one dollars, interest and costs; levied their execution on some promissory notes on V. Wiltz, which had been transferred by their debtor to the defendants. The latter refused to recognize the plaintiffs' right to any part of the notes thus transferred.

The plaintiffs have instituted this action to recover the amount of their judgment against Walley from the defendants, on the ground that they received said notes from Walley when he was insolvent, with a knowledge of his insolvency, and in fraud of their rights as creditors. They demand a rescission of the contract or transfer, and judgment for the amount of their claim.

The defendants pleaded a general denial.

The case turned entirely on the fact of insolvency, or that the defendants knew of it at the time of the transfer.

EASTERN DIST. The parish judge was of opinion, the plaintiffs failed to
February, 1840. show these facts, and gave judgment for the defendants.

ADAMS
VS.
HIS CREDITORS.

The plaintiffs appealed.

Micou, for the appellants.

Benjamin, contra.

Bullard, J., delivered the opinion of the court.

This is an action to annul the transfer, to the defendants, by Walley, debtor of the plaintiffs, of certain notes, on the ground that the contract was in fraud of the rights of the plaintiffs, as judgment creditors. It was alleged, that Walley was insolvent, at the time of the transaction, to the knowledge of the defendants.

The case turns entirely on questions of fact. The Parish Court was not satisfied by the evidence, that Walley was insolvent at the time of the contract, or that the defendants knew of his insolvency. A careful examination of the record has brought us to the same conclusion.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

ADAMS VS. HIS CREDITORS.

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
 PARISH OF IBERVILLE, JUDGE COOLEY, THE THEN JUDGE OF
 THE DISTRICT, PRESIDING.**

In a *concurso*, where all the parties are plaintiffs and defendants, any averment made by *one creditor*, in relation to a particular claim, as a charge or allegation of fraud, must *avail all the other* opposing creditors, interested in defeating it; because a claim cannot be rejected as to some creditors, and upheld as to others.

The allegation of fraud and collusion against a judgment, puts the party in whose favor it is rendered, to the proof of the facts on which it is based. EASTERN DIST.
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A party seeking to recover, must make his claim certain ; it is not enough to render it only probable.

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In relation to property acquired by illicit traffic, a partner stands in a different light from creditors ; they claim to be paid out of the general assets of their debtor, the partner seeks for one-half of the property, unlawfully acquired, and cannot be listened to.

Where the signatures of the proper officers of a corporation are proved, and the seal is affixed, the courts are to presume the officers did not transcend their authority, and that the seal was affixed according to the requirements of the charter.

Courts may, however, when a deed is signed by the officers and sealed with the seal of the corporation, look beyond the seal, but it is *prima facie* evidence that it was so affixed by proper authority. The contrary must be shown by the adverse party.

On the 9th March, 1833, the plaintiff filed his petition and bilan, and obtained a stay of proceedings, under the insolvent laws.

He placed his daughter, Mrs. P. Andrews, on his bilan as a privileged creditor of the first rank, on account of a judgment she had obtained against him in the Probate Court for fifty-three thousand eight hundred and forty-seven dollars, for her mother's half of the succession, as it stood at her decease in 1819.

Also, a claim held by the Mercantile Insurance Company of New-York, originally belonging to the Life and Fire Insurance Company of New-York, for the sum of thirty-seven thousand seven hundred dollars, and likewise a judgment debt due to the syndics of W. Kenner & Company, for six thousand eight hundred and ninety-one dollars, and a judgment debt held by Josiah Barker, for four thousand dollars, with other privileged and ordinary debts to a large amount. Syndics were appointed to take charge and sell the property, and distribute the proceeds among the creditors.

On the 26th September, 1836, after making sales of the property surrendered, the syndic filed a provisional tableau

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of distribution. He alleges, that the net amount of sales is seventy-seven thousand one hundred dollars, payable in three instalments, and that after paying law charges and necessary expenses of administration, there remains a balance in his hands of eighteen thousand two hundred and fifty-three dollars. He further alleges, that Mrs. P. Andrews, daughter of the insolvent, is a privileged creditor, in virtue of the right of inheritance from her deceased mother, to the amount of one hundred and eight thousand five hundred and fifty dollars, which he places on the tableau as a privileged claim of the first class, and appropriates the balance in his hands to its partial payment. He prays, that said accounts and tableau be received and homologated.

The Mercantile Insurance Company of New-York, Josiah Barker, and the syndic of Kenner & Company, with other creditors, made opposition to the tableau, and particularly to the claim of Mrs. P. Andrews, denying that she was entitled to any sum in right of her mother; alleging, that the community existing between her and the insolvent, at the time of its dissolution, was of no value, and, in fact, insolvent. Some other opponents alleged, that her judgment against the insolvent was fraudulent and collusive, and obtained in fraud of the *bona fide* creditors. The oppositions were principally directed against this judgment, and also against the allowance of the sum to Mrs. Andrews, on the ground that the evidence showed the community was insolvent in 1819, the time of its dissolution.

On these several oppositions, a mass of testimony was taken, and various proceedings had, which come up in two heavy and confused records.

After hearing all the parties, and wading through the immense mass of evidence of every kind, the district judge came to the conclusion, that all the property and effects which was in the possession of the insolvent at the death of his wife, must be considered as belonging to the community, unless the contrary was shown, and that Mrs. P. Andrews, being the only surviving heir of the insolvent and his deceased wife, and a minor at the time of the dissolution of

the community, was entitled, by mortgage and privilege, to one-half of the same, after deducting debts, &c. ; and that the testimony showed the one-half of the community was worth considerably more than the sum now offered to be distributed. Judgment was rendered, homologating the tableau, and ordering the balance on hand to be paid to Mrs. P. Andrews, after deducting costs. The opposing creditors appealed.

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Ives, for the appellee, Mrs. P. Andrews.

Jacob Barker, argued the case for the New-York Mercantile Insurance Company, Kenner's syndic, and Josiah Barker, appellants.

Morphy, J., delivered the opinion of the court.

An account current of his administration was filed by the syndic, in this case, showing a sum of eighteen thousand two hundred and fifty-three dollars, then ready for distribution. It was accompanied by a petition, setting forth that Penelope Adams, wife of John Andrews, is a privileged creditor for one hundred and eight thousand five hundred and fifty dollars, being the amount accruing to her from the estate of her mother, Susan Johnson, the deceased wife of the insolvent. She is therein set down as entitled to the whole balance, in part payment of her claim. To this tableau of distribution, if it can be so called, a number of oppositions were filed, all directed against this claim, which, if admitted, would render all further litigation, among the other creditors, useless and unprofitable, all the assets of the estate amounting only to about seventy-seven thousand dollars. The multifarious pleadings below, together with the mass of oral and documentary evidence adduced, have formed one of the most confused and unwieldy records ever, perhaps, presented to the examination of this court. The judge below, has been contented with stating, that Mrs. Andrews' rights greatly exceeded the sum then in the hands of the syndic, and has decreed said sum to her, in part payment of her claim, without fixing its amount, and without

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passing on any of the claims of the opposing creditors. With such a judgment before us, we would, perhaps, be justified in reversing it, and remanding the case for further proceedings, that something more definite should be sent up for our revision ; but we have been requested by all parties, to pronounce on the claims of Mrs. Andrews, Mr. Andrews, and of the Mercantile Insurance Company of New York.

On the death of Susan Johnson, the mother of Mrs. Andrews, no inventory appears to have been taken, nor any steps towards a liquidation of the community. A few months before Adams failed, his daughter obtained against him, in the Probate Court of Iberville, a judgment, decreeing to her, for her mother's half of the community, fifty-three thousand eight hundred and forty-seven dollars and fifty cents, independent of her undivided interest in certain pieces of property, supposed to have belonged to the community. This judgment, upon which Mrs. Andrews rests her main hopes for success in this court, has produced a protracted and angry debate between her counsel and those of the opposing creditors. Professional zeal, and, perhaps, a too lively sensibility for the feelings of their clients, have induced counsel to indulge in sarcasm and personal remarks, which, far from assisting us in the performance of our duties, render them more difficult and somewhat unpleasant. With the character and general reputation of the parties litigating before us, we have nothing to do. We sit here in judgment on their legal rights, and permit no impressions to be made on our minds but such as may result from the evidence exhibited by the record.

This judgment is attacked by one of the opposing creditors as having been obtained through fraud and collusion, and by another as having been rendered by consent, which we understand to be, in substance, the same charge.

In a *concurso*, where all the parties are plaintiffs and defendants, any averment made by one creditor, in relation to a par-

Although the Mercantile Insurance Company, with whom this contest has been mainly carried on in this court, has not made any such allegation, we think that in a *concurso*, where all the parties are plaintiffs and defendants, any averment, made by one creditor, in relation to a particular claim, must

avail all the other opposing creditors interested in defeating it; because a claim cannot be rejected as to some creditors, and upheld as to others. Appellee's counsel has contended, that Mrs. Andrews' judgment is binding and conclusive, and that some evidence or color of fraud must be shown before she can be put to the proof of her claim. We consider it well settled law on this subject, that the allegation of fraud and collusion has the effect of putting the party to the proof of the facts on which the judgment purports to be based. It implies that no evidence was given, nor a proper defence made; it involves, then, a negative, and the *onus probandi* must be on the party who avers that full proof has been made, and that the judgment was rendered without collusion, because the assertion of his adversary is not susceptible of proof.

But if any *prima facie* evidence of collusion, and of that technical fraud contemplated by law, was indispensable, we think that it is furnished by the record before us. The insolvent's answer, filed by himself, apparently without the assistance of any counsel, or any previous citation, begins with a general denial, and goes on to state a number of facts upon which this judgment appears mainly to be predicated; facts which, in many instances, are disproved by the evidence. These circumstances, coupled with the close and suspicious relation in which these parties stood to each other, form, to our minds, a *prima facie* evidence of collusion, amply sufficient to put this party to the proof of her claim, independent of the judgment.

When approaching this investigation, we had strong doubts whether, in the conjugal, as well as in every other partnership, the party claiming a share in it should not first be held to prove a settlement of all debts due to third persons. It is true, that in the system of laws from which we have derived our community of goods and acquets, the interest of the wife in the property of the community was held to attach on its dissolution, subject to her right of renunciation. But, under those laws, a difficulty like the one presented to us could hardly occur. The sense of duty which should

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ticular claim, as a charge or allegation of fraud, must avail all the other opposing creditors, interested in defeating it; because a claim cannot be rejected as to some creditors, and upheld as to others.

The allegation of fraud and collusion against a judgment, puts the party in whose favor it is rendered, to the proof of the facts on which it is based.

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prompt a surviving father to settle the community, was not trusted by the lawgiver to him alone ; on its dissolution, the ministers of justice stepped forward and took in hand the rights of the minor, or absent heirs. Thus, a settlement was enforced, enabling the wife or her heirs to ascertain whether it was their interest to accept, or renounce. Here, we are called upon, after a lapse of some twenty years, to say what was the situation of this community ; however, the opposing creditors not having raised this question, and its solution not being absolutely necessary in this case, we shall proceed with the investigation before us.

The claim set up by the appellee, may be considered by us, as it has been in the argument, under three distinct heads :

1. For moneys and notes, owned by Adams at the death of his wife.
2. For slaves, then existing, and since sold by him.
3. For immoveable property, the title of which was then in her father.

I. A number of witnesses have been examined, as to the reputed wealth of C. Adams twenty years ago ; some saw money, others saw negotiable notes, to large amounts, in his hands at different periods before the death of his wife. It cannot be seriously expected of us to award any specific sum, on evidence of this description, vague, inconclusive, consisting mainly of the opinions of these persons, and contradicted, in many particulars, by the authentic evidence on file. Most of the notes thus seen in his possession, were described as falling due some time after the death of Mrs. Adams ; hence, the appellee's counsel would have us infer, that the insolvent owned them at the dissolution of the community. It is not enough for the appellee to render this probable ; she should make it certain. But, to our minds, even such a presumption does not exist, for, pressed and embarrassed, as the evidence shows the insolvent to have always been, it is difficult to believe, that this negotiable paper, represented to be as good as bank notes, should have thus long remained in his hands, and Adams himself, in his answer to his daughter's suit, enumerates the slaves and

A party seeking to recover, must make his claim certain ; it is not enough to render it only probable.

property which he owned, but says not a word of those notes, or of any credits then belonging to him.

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II. As to the slaves, existing at the dissolution of the community, and sold subsequently by Adams, no ownership is proved in any, except those attached to the Claiborne plantation. As to the others, the record shows, nay, it is admitted, that they were African negroes, smuggled into this state, in violation of our laws. With such evidence before us, can we listen to any claim for a partition of those slaves, or their proceeds? There is no principle better settled, than that no action can be maintained on a contract, the consideration of which is immoral, or prohibited by law. Here, the action does not, it is true, grow out of a contract, but as it has for its object to obtain a share, in partnership property, obtained by means of a nefarious and illicit traffic, we apprehend that the same rule must apply. "*Ex turpi causa non oritur actio.*" But it is said, that if those slaves, or their proceeds, are not good property for the appellee, they cannot be so considered for the creditors. We conceive that the latter stand in a position widely different from that of the appellee. They claim to be paid out of the general assets of their debtor, and have nothing to do with the manner in which he might have acquired any portion of them. Not so with the present claimant; she sues, as partner, for one-half of the very property thus unlawfully acquired. We cannot award to her any portion of it, without sanctioning the violation of those laws we have sworn to respect and enforce.

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In relation to property acquired by illicit traffic, a partner stands in a different light from creditors; they claim to be paid out of the general assets of their debtor, the partner seeks for one-half of the property, unlawfully acquired, and cannot be listened to.

III. The three only pieces of landed property, of any importance, which Adams appears to have owned, are the *Claiborne*, the *Belle*, and the *Cropper* tracts.

The Claiborne place was purchased within one year before the death of insolvent's wife, for sixty-two thousand one hundred dollars, payable in several instalments, all falling due after that time. The evidence shows, that no portion of the price had been paid before the dissolution of the community, although Adams, in his answer to his daughter's suit, declares, that at that time he had paid twenty thousand dollars on that property. The first and second instalments,

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February, 1840. paid by Adams after the dissolution of the community, and
 form against it a claim which, by his surrender, must have
 passed to his creditors. This plantation was afterwards
 seized, and sold to pay the balance yet remaining due. It
 brought forty-seven thousand seventy-five dollars, thus
 leaving a clear loss for the community in which the title
 was vested.

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Notwithstanding Adams' declaration in his answer to his daughter's suit in the Probate Court, the title to the Belle plantation is proved not to have been in him on the 7th January, 1819: Adams and Spraggins, who owned it, had, before that time, sold it to Brand and Foster for fifty-five thousand dollars, in notes payable from one to four years. But it is contended that as Adams, when he afterwards purchased back from Brand and Foster one half of this plantation, returned to them their own notes in payment, the community should be credited with their amount, deducting eleven thousand dollars (Adams' proportion of the original price yet unpaid.) This would leave for the community a profit on this property of sixteen thousand five hundred dollars, one half of which the appellee would be entitled to, should we grant her the benefit of the presumption that these notes continued to belong to him during all the intermediate time.

The Cropper tract, was purchased by Adams on the 18th of January, 1818: for this property, we find Adams promising to give four negroes, and assuming the payment of a mortgage for four thousand seven hundred and fifty dollars, in favor of Durnford. This property was seized and sold to pay his debts after his wife's death, and brought fifteen hundred dollars over and above the sum of four thousand seven hundred and fifty dollars, yet unpaid.

Thus, we have examined more minutely, perhaps, than it was necessary, the facts upon which this claim rests; we have done so on account of the presumption of its correctness, which would seem to result from the judgment obtained by appellee in the Probate and District Courts: it will be seen that even without looking into the debts of the

estate, we could hardly allow any thing to have been proved as lawfully belonging to Adams at the death of his wife ; but the record abounds with judgments against him, rendered after the dissolution of the community it is true, but still for debts, many of which existed before ; and such of those debts as the record proves to have been paid by him since his wife's death, are so many just claims against the community, which have passed to his creditors. Of the exact amount of his debts at the period the community was dissolved, it is difficult to form an estimate from the record ; but a close and patient investigation of the whole case, leaves no doubt, in our minds, of the utter insolvency of C. Adams, at the time of the death of his wife.

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There has been little or no dispute about the claim of John Andrews. As transferee of a twelve months bond, subscribed by insolvent, Robert Bell and Dela F. Heath, he claims a balance of three thousand three hundred and one dollars, yet due on it. The property on which he contends for a lien to secure this balance, is called in the tableau, the "Iberville back-land," a description rather vague, but sufficient, however, we think, to show its identity with that described in the bond. It produced a sum of five thousand dollars, on which this claimant has a special mortgage and a privilege. *Article 722 and 723, of the Code of Practice.*

We next proceed to the consideration of the claim of the Mercantile Insurance Company. It is based upon an assignment made to them in 1826, by the Life and Fire Insurance Company of New-York, of a mortgage debt, which originated in a loan from the assignors to the insolvent in 1824. On this debt the Life and Fire Insurance Company had obtained in the U. S. District Court a judgment, which forms the title of the present claimants.

For the purpose of defeating this claim, numerous objections have been raised in argument ; we shall notice only such as have appeared to us material.

The assignment is said to be without proof. It purports to be signed by the president and secretary of the company. The signatures and official capacities of the persons signing as

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Where the signatures of the proper officers of a corporation are proved, and the seal is affixed, the courts are to presume the officers did not transcend their authority, and that the seal was affixed according to the requirements of the charter.

Courts may, however, when a deed is signed by the officers and sealed with the seal of the corporation, look beyond the seal, but it is *prima facie* evidence that it was so affixed by proper authority. The contrary must be shown by the adverse party.

president and secretary, have been proved ; but this is said to be insufficient. Appellee's counsel contends, that proof should have been given of the authority of these persons to act in the execution of this assignment. To this it is answered, that this Court is bound to presume that these officers did not transcend their power, and that the official seal of the company was affixed to the instrument according to the requirements of the charter. We hold the doctrine to be that, though a deed be signed by the president and secretary, or cashier of a corporation, and be sealed with its corporate seal, yet the courts may look beyond the seal. If it be affixed without the authority of the directors, and that fact be made to appear, the instrument will be declared null and void ; but the seal itself is *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party. See *Angell & Ames on Corporations*, chapter 6, section 7, page 114 ; *Ibid.*, chapter 8, section 6, page 164 ; *6th Sergeant & Rawle's Reports*, page 12. It was, therefore, incumbent on the party objecting here, to have rebutted this *prima facie* evidence, by producing the charter and showing that other formalities not complied with, were required for the creation of this contract. But in looking into the pleadings in relation to this assignment, which is expressly alleged in the opposition of the Mercantile Insurance Company, we find that, far from denying the fact of the assignment, the answer of Andrews and wife, avers that the debt is extinguished by compensation, although no evidence whatever in support of this plea, was afterwards adduced. But besides this, a few months after the assignment, the insolvent accepted notice of the transfer, thus acknowledging the Mercantile Insurance Company as his creditors.

Prescription, fraud, usury, &c., have been successively urged in argument against this claim. These pleas might, perhaps, have availed appellee against the notes and deed of mortgage of 1824, but they cannot reach the judgment in which these evidences of debt are all merged. To this judgment itself, however, many objections have been made ; some of which would probably prove fatal, if this judgment

was before us for revision, either on an appeal or in an action of nullity. But we have a judgment of the U. S. District Court for the eastern district, rendered in 1826. It is based on a compromise entered into between the parties, to stay the execution of an order of seizure and sale, which had issued against the Belle plantation, under the mortgage of 1824.

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This compromise, by agreement, was to be entered on the records of the court, in a suit then pending between the parties, and is referred to in the decree which dissolves the injunction sued out by C. Adams, and at the same time grants a stay of execution until the 18th of January, 1829, when all the notes described in the original mortgage were to have become due:

This judgment may be erroneous, the formalities required by law may not have been pursued in its rendition ; but there it has stood without contradiction for the last fourteen years, and has thus acquired the authority of the thing adjudged. It is said next, that the registry of this judgment in the parish of Iberville, has not been renewed in pursuance of article 3333, of the *Louisiana Code*, and that, therefore, the mortgage no longer exists. To this it is a sufficient answer to say, that the judgment was recorded in Iberville on the 20th May, 1826, and that the insolvent made his surrender in March, 1833 ; the mortgage was raised and the property had passed into the hands of a third person, before the expiration of ten years from the date of the registry ; a re-inscription under such circumstances, would have been a most vain and senseless proceeding ; but even the registry of the original mortgage on which the compromise and judgment afterwards intervened, was in full force when the surrender took place, for ten years had not elapsed from its date, to wit : 24th January, 1824.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed ; and it is further ordered, that the claim of Penelope Adams, wife of John Andrews, be rejected ; that John Andrews be placed on the tableau as a mortgage creditor on the proceeds of the

EASTERN DIST. Iberville back land, for three thousand three hundred and one
February, 1840. dollars, with interest at the rate of ten per cent. per annum,
from the 8th of July, 1832, until paid. That the Mercantile
IRWIN ET AL. Insurance Company be placed on the tableau as mortgage
VS. and judgment creditors for thirty-two thousand two hundred
STEAMBOAT and eighty dollars thirteen cents, with interest at the rate of
KENTUCKIAN. seven per cent. per annum, from the maturity of the respec-
tive notes mentioned in their compromise and judgment,
until paid.

And, it is further ordered, that the case be remanded for
further proceedings to be had on a final tableau of distribu-
tion ; the costs of both courts to be paid by appellee.

IRWIN ET AL. VS. STEAM-BOAT KENTUCKIAN.

**APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

Where the defendant offers no evidence in support of his pleas, and
nothing to support his appeal, judgment will be affirmed, with the
maximum of damages.

The plaintiffs allege, that the owners of the steam-boat
Kentuckian, who are unknown to them, but are represented
by an agent, Buckner, as captain, are indebted to them three
hundred and thirty-one dollars ninety-two cents, for supplies
furnished said boat, and for which they pray judgment, with
privilege, &c.

The owners appeared by counsel ; admitted the plaintiffs
demand, and set up a large claim in compensation and recon-
vention, but on the trial offered no proof. There was judg-
ment against them, and they appealed.

Benjamin, for plaintiffs, prayed the affirmance of the judg-
ment, with damages and costs.

R. Hunt, contra.

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Martin, J., delivered the opinion of the court.

The plaintiffs claim three hundred and thirty-one dollars ninety-two cents, for supplies furnished the steam-boat Kentuckian. The answer does not deny, but admits the claim. There is a plea of compensation and reconvention for a larger sum, and judgment is prayed against the plaintiffs for the balance.

No evidence whatever is offered in support of these two pleas. Judgment was given for the plaintiffs' claim alone, and the defendant appealed.

Nothing has been shown in this court in support of the appeal. The plaintiffs and appellees have prayed for the affirmation of the judgment, with damages as for a frivolous appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs and ten per cent. damages.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF
IBERVILLE, JUDGE NICHOLLS, OF THE SECOND DISTRICT, PRESIDING.

Where the absence of a witness is not accounted for, and he is not dead,
a note of his testimony, not signed, is *inadmissible* in evidence.

A document signed by *L. for B. Z. C.*, register of the land-office, is
inadmissible in evidence. Nothing shows that the register may act by
proxy or deputy; or that he delegated his powers to another to affix his
signature.

The defendant, under an averment to rescind the sale to him by the
plaintiff, cannot offer outstanding titles in others in evidence, when he
is in possession. If he was in danger of eviction, the most he could do
would be to withhold the price until security was given.

EASTERN DIST. This case was before the court and remanded, at the March term, 1839. See 13 *Louisiana Reports*, 151.
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There was intervention filed by O'Duhigg & Chategnier, to whom the notes in suit had been transferred *pendente lite*.

The district judge rejected all the matters and evidence set up in defence, for a rescission of the sale; and gave judgment for the intervenors against the defendant, for the amount of the notes, and he appealed.

Lobdell, for the appellant, insisted that the plaintiff, Lesassier's title, which he sold and conveyed to the defendant, was defective, and the land so encumbered with mortgages and servitudes, that the sale ought, in law, to be rescinded, and the notes and money paid, returned.

Winchester and Ives, contra.

Bullard, J., delivered the opinion of the court.

The defendant being sued on his promissory note, pleaded that it was given, together with others, for the price of a plantation and slaves, sold to him by the plaintiff. He alleges, that he is not bound to pay the same, because of a considerable deficiency of the land and on account of other vices and defects, which, if he had foreseen, he would not have purchased, to wit., that 1st, He cannot become a stockholder of a bank, nor obtain a loan upon mortgage of the property. 2d, That the property is encumbered with charges and servitudes not apparent, of which plaintiff made no disclosure at the time of the sale, and he specifies one in favor of Dr. Guito and wife. 3d, That there exists on the property a tacit mortgage in favor of the heirs of Monier, and in favor of the minor Luke Lesassier. 4th, The unsoundness of two slaves. The defendant claims a rescission of the sale, and that the part of the price already paid, may be refunded, together with damages. In a supplemental answer, the defendant charged his vendor, the plaintiff, with a fraudulent concealment of these deficiencies and vices. O'Duhigg & Chategnier, to whom the note was assigned, *pendente lite*, inter-

vened, and judgment having been rendered in their favor, the defendant prosecutes this appeal.

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This case has been already before this court. (See 13 Louisiana Reports, 151.) It was then remanded for a new trial, which was followed by the same result. We concur with the court below in the opinion, that there is not sufficient evidence of a fraudulent concealment, to entitle the defendant to the relief he asks. It is not pretended that there is any material deficiency in the front tract; but it is contended that instead of four hundred arpents of back lands conveyed, there is found to be less than one hundred, which was vacant and liable to be entered under the pre-emption laws. By the act of sale it was agreed that, "in case the title to the said second concession should not be found to be recognized, or confirmed by the United States, the said Timoleon Lesassier binds himself to pay for the purchase thereof, under the existing laws relative to pre-emption rights, &c., for the quantity of four hundred arpents; but if there can be obtained a greater quantity than four hundred arpents, then the acquisition of the surplus to be at the expense of the present purchaser."

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This appears to us a special modified warranty, and must conclude the parties, unless it be shown that there was fraud in the vendor; which, we have already said, the defendant has failed to establish.

The defendant next complains of the servitude as it is called, which is claimed by Dr. Guito and his wife. The act of sale sets forth the usufruct granted to Dr. Guito and his wife during their natural lives. If by any act under private signature, those persons should claim any thing more than the right of occupation set forth in the deed, and to which the defendant assented, it is obvious that it would not be obligatory upon him.

The general legal mortgage on all the property of T. Lesassier, resulting from his appointment as tutor of Luke Lesassier, appears to have been released by the advice of a family meeting, and a special mortgage accepted in lieu of it. Whatever may hereafter be the result of a suit by which the

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Where the absence of a witness is not accounted for, and he is not dead, a note of his testimony, not signed, is inadmissible in evidence.

A document signed by L., for B. Z. C., Register of the Land-office, is inadmissible in evidence. Nothing shows that the Register may act by proxy or deputy, or that he delegated his powers to another to affix his signature.

The defendant, under an averment to rescind the sale to him by the plaintiff, cannot offer outstanding titles in others in evidence, when he is in possession. If he was in danger of eviction, the most he could do would be to withhold the price until security was given.

minor on arriving at the age of majority seeks to annul that proceeding, we are of opinion it cannot affect the rights of the defendant, who purchased under the faith of these proceedings, apparently sanctioned by the Probate Court. See the case of *Casanova's Heirs vs. Avegno*. 9 *Louisiana Reports*, 192.

Our attention has been called to several bills of exceptions. The first was taken to the refusal of the judge to permit the notes of the testimony of a witness, taken on a former trial, to be used in evidence. We think the court did not err. The absence of the witness was not accounted for; and a simple note of the testimony of a witness, not signed by him, is not equivalent to a deposition, and cannot be used except in a case of necessity, as of the death of the witness.

The next bill of exceptions was taken to the rejection as evidence in the cause, of a document purporting to be signed by Lafferanderie, for B. Z. Canonge, register of the land-office. The court did not err. Nothing shows that the register of the land-office may act by proxy, or that he had delegated his powers to the person whose signature was affixed to the certificate.

Lastly, the defendant offered in evidence, sundry grants and Spanish plats, to show that the original plaintiff did not own and possess a part of the land sold to the defendant, but that the title was in other persons. The documents were objected to and refused, on the ground that they could not be received under the pleadings, and because the plaintiff had no notice of the defendant's intention to set up these titles in conflict with the lands sold by Lesassier; and, that an outstanding title, however it might authorize the withholding of the price, furnishes no ground for the rescission of a sale. The defendant, therefore, took a bill of exceptions.

We concur with the court below in its view of this subject. The purchaser appears to have been in the undisturbed possession of the property sold, and had been evicted of no part of it. Even if suit had been already instituted against him to recover a part or the whole property, with manifest danger of eviction, the most he could have required would have been security to make good the warranty.

Upon the whole, after an attentive consideration of this cause upon the different points submitted, we conclude that the defendant has failed to make out a case for the relief he asks. (The court below properly refused to transfer the case to the District Court of the United States. No security was offered according to the act of congress.)

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE PARISH OF IBERVILLE, JUDGE NICHOLLS, OF THE SECOND, PRESIDING.

The ten days allowed for the defendant to answer in, are not required to expire before the commencement of the term to which he is cited. As soon as they expire, if the court is in session, the plaintiff may proceed to take judgment by default if the answer is not put in.

This is an action against the maker of three promissory notes, payable to the order of one Robert D. Percy, and by him endorsed in blank. The plaintiffs allege, that the payment of said notes is secured by a mortgage on a plantation and slaves, which is expressed in an act of sale with mortgage, between one T. Lesassier and the said A. Dashiell, bearing even date with said notes, and dated the 8th of March, 1836. They pray judgment for the amount of said notes, with mortgage on the plantation and slaves, and that they be seized and sold to satisfy it. The defendant excepted to having the cause set for trial at the April term, 1839, of the court, because there was not ten days elapsed between the service of citation and the commencement of said term. That he must have until the term following to answer in. The

EASTERN DIST. exceptions were overruled, and the defendant excepted to the
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He then filed an answer, averring and setting up various defects and encumbrances in the title to the plantation and slaves, for which the notes sued on were given, embracing the same matters contained in the defence to the suit of Timoleon Lesassier against him. *See 13 Louisiana Reports, 151*, and the same case just decided on a second appeal; *see ante*, 467.

The defendant prays that the sale be rescinded, the notes cancelled and given up, and the money paid refunded with damages.

There was judgment overruling all the matters set up in the defence, from which the defendant appealed.

Lobdell, for the appellant.

Winchester and *Ives*, contra.

Bullard, J., delivered the opinion of the court.

This case presents the same questions which have just been considered in the case of *Lesassier vs. Dashiell*, it being a suit on another instalment of the price. Other incidental questions arose, however, which we proceed to notice.

The appellant contends, that the court erred in overruling his exception, by which he insisted on his right to have the legal delays for answering before the first day of the term, and in setting down the case for trial at that term. We are of opinion that the court did not err. The 310th article of the Code of Practice, authorizes a judgment by default after the legal delays; that is, after ten days from the service of citation, when the defendant resides in the place of holding the court, and the addition of one day for every ten miles that his residence is distant from such place. It does not distinguish whether these days are to run in vacation, or in term time. Whenever that delay expires, in our opinion, if the court be in session, the plaintiff is entitled to a judgment by default, if the defendant fails to answer. The article 317,

provides that it shall suffice that the answer is filed on the first day of the term, even when the delay expires sooner.

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The endorsements on the note were in blank, and the plaintiff was permitted to strike out the last on the trial. We see no objection to this. *Chitty on Bills*, 371.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TURPIN vs. REYNOLDS.

HOBSON AND GOOCH, GARNISHEES.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The privilege given to factors, in article 3214, of the Louisiana Code, is intended to aid the interests of commerce; and the word *advances*, used therein, is not to be restricted in its meaning to actual disbursements, but must be construed in an enlarged sense, with reference to commercial usage, and include *acceptances* not yet paid.

So, where factors or commission merchants accepted drafts on the faith of the defendant's promise to ship and consign a certain quantity of cotton: *Held*, that the consignees will hold the cotton, so consigned, against the attaching creditors of the defendant.

The plaintiff instituted suit against the defendant, Reynolds, on his check for three thousand dollars, drawn on the Union Bank of Mississippi, and duly protested for non-payment, and attached two hundred and fourteen bales of cotton, in the hands of Hobson & Gooch, commission merchants in New-Orleans. They were duly cited as garnishees, and required to answer interrogatories.

The garnishees intervened, and alleged, that they had received the two hundred and fourteen bales of cotton,

EASTERN DIST. attached, on the 19th February, 1839, with the bills of February, 1840. lading, on consignment, in consequence of a previous agree-

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ment, under which they had accepted sundry drafts to a large amount, on account of cotton to be shipped to them by the defendant. They claimed the right to hold the cotton under these acceptances and agreement.

On the evidence adduced, the parish judge decided :

1. That it was clearly shown and established, that the intervenors had made advances to a large amount to the defendant, G. W. Reynolds, on cotton to be sent to them from Mississippi.

2. That, especially, on the shipment of the two hundred and fourteen bales of cotton attached, the bills of lading were received before the attachment was served.

3. That the amount of acceptances, and since paid by the intervenors on the faith of this shipment, greatly exceeded the value of the cotton attached.

There was judgment in favor of the intervenors, and the plaintiff appealed.

T. Slidell, for the plaintiff, contended, that the liability which the intervenors allege they came under to the holders of defendant's paper, is not real ; that it was, in fact, no advance or payment, and nothing more than an accommodation endorsement.

2. There was no pledge of this cotton, so as to make it liable to the claim of the intervenors ; none of the formalities of the contract of pledge were complied with. There was no delivery. It is essential in the contract of pledge, that the creditor be put in possession of the thing given in pledge. Here, the cotton was on the defendant's plantation, in Mississippi, when this pretended pledge was made.

There was no sale of the cotton to the intervenors, and there was no advance, further than endorsing defendant's drafts. But they allege a pledge and sale, when the evidence shows there was neither.

4. They cannot claim a privilege as commission merchants, for they sued as owners, and not a word is said about

a privilege, in the pleadings. But, if there had been, they do not come within the law. *Louisiana Code*, 3214. EASTERN DIST.
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I. W. Smith, for intervenors and appellees.

1. The garnishees and intervenors deny they have any property of defendant, and swear to the facts from which they draw this inference. This answer, made under oath, makes full proof of the facts contained in it, until the plaintiff shows its falsity, either by positive written proof, or by two witnesses. *Code of Practice*, 264. This he has not shown.

2. The plaintiff failed to establish the interest of Mr. Snodgrass, in the event of this suit. Before he became a partner, the bills were accepted by the agent of the garnishees.

3. The defendant's letter was evidence as part of the *rei gesta*. The bill for ten thousand dollars, was accepted on this letter, and was an advance on the two hundred and fourteen bales, then received by the garnishees.

4. The first endorsers names were in blank. The subsequent ones, though special, might be stricken out. It was even unnecessary to strike them out, the acceptors having paid the bill after it had been put in circulation. *Chitty on Bills*, 637.

Morphy, J., delivered the opinion of the court.

The plaintiff sued out an attachment against defendant, a non-resident, and cited, as garnishees, Hobson & Gooch, commission merchants, trading in Vicksburg, in the state of Mississippi, under the firm of "Gooch & Hobson," and in this place, under the commercial name and firm of "Hobson & Gooch." The latter answered, averring, that they had nothing in their possession belonging to the defendant, unless it should be considered that two hundred and fourteen bales of cotton, attached in their hands by the sheriff, were the property of defendant, which they denied, and they annexed to their answers a copy of their petition of intervention, previously filed. In this petition, the interpleaders state, that in consequence of previous arrangements, made in Vicksburg, and which they set out at full length, they had agreed to accept, and did accept, in New-Orleans, bills of

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exchange, drawn by defendant on them to a large amount, on the faith of the defendant's promise and engagement to forward and consign to them, in New-Orleans, six hundred bales of cotton, of which the two hundred and fourteen attached were a part ; that acceptances of defendant's drafts, to an amount greatly exceeding the value of these two hundred and fourteen bales, had already been made by them, and that they were in possession of the bill of lading and cotton shipped to them, before plaintiff levied his attachment on this cotton ; that by reason of said advances, and the transfer made to them in Vicksburg, by defendant, of the six hundred bales of cotton, they had an absolute right to the possession and property of the cotton attached.

The evidence shows, that the writ of attachment was executed on this cotton on the 21st of February, 1839 ; that the bill of lading was placed in the hands of the garnishees, on the 19th, and the cotton itself stored in their name, and for their account, in the press of Tilghman & Barnes, on the 20th. Leaving entirely out of view the endorsements given by the garnishees on part of the bills, and their negotiation in Vicksburg to procure to the defendants their amount in cash, the evidence shows, that previous to the attachment here, they had accepted defendant's drafts, to an amount greatly exceeding the proceeds of this parcel of cotton, which are said to amount to about ten thousand thirty-two dollars and forty-seven cents. It is also shown, that this cotton was forwarded to the garnishees, in pursuance of their promise to accept defendant's drafts.

These facts would seem to bring the intervenors completely within the purview of article 3214, of the Louisiana Code, but the plaintiff in attachment objects :

1. That the advances spoken of in the above cited article, mean an actual disbursement of money, and not a prospective obligation to pay money by the factor.

2. That by their pleadings, [intervenors do not claim the privilege conferred by our code, but claim the cotton as owners, in which capacity they have failed to show any right, to it.

I. The privilege given by article 3214, of the Louisiana Code, was evidently intended to aid the interests of trade and commerce, and promote a liberal spirit on the part of factors, in respect to advances to their principals. Nothing indicates that the word *advances*, therein used, must be restricted to actual disbursements of money, the provision being one in relation to dealings of a character eminently commercial. The terms used in it should be understood, and construed with reference to mercantile usages. In commercial parlance, a commission merchant is said to be in advance to the planter when he has accepted his drafts, and it is very seldom, we apprehend, that advances are differently made in this country. By accepting the planters' drafts, the merchant is primarily liable for their amount, and is as much entitled to be secured against his liability, as if he had transmitted the money to the drawer. And what is a bill of exchange but an equivalent for the transmission of money from one place to another? The principal who negotiates a bill of exchange, on the credit of a promise to accept, is in possession of the amount even before its actual acceptance. It is customary, we understand, among merchants, when they wish to restrict the meaning of the word *advances*, to actual disbursements of money, to use the term *cash advances*. This enactment appears to us to be already sufficiently at variance with the *lex mercatoria* of our sister states, when it confines the lien given to factors to specific advances, made on the very goods consigned to them, or placed in their hands for sale. We conclude, then, that the word *advances*, not being in any way qualified, we believe it our duty to give it that enlarged sense which best comports with the policy of the provision itself, and the general convenience and usages of trade.

II. As to the second ground, the intervenors, it is true, allege, that in consideration of their endorsements, acceptances and negotiations in Vicksburg, in relation to these bills, the defendant had pledged, sold, and transferred to them, the six hundred bales of cotton mentioned in their petition, but, at the same time, they have averred and proved facts which

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The privilege given to factors, in article 3214 of the Louisiana Code, is intended to aid the interests of commerce; and the word *advances*, used therein, is not to be restricted in its meaning to actual disbursements, but must be construed in an enlarged sense, with reference to commercial usage, and include *acceptances* not yet paid.

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So, where factors or commission merchants accepted drafts on the faith of the defendant's promise to ship and consign a certain quantity of cotton : *Held*, that the consignees will hold the cotton, so consigned, against the attaching creditors of the defendant.

entitle them to the privilege they now contend for. They have clearly misunderstood the extent of their rights, as resulting from the facts which show neither a sale nor a pledge; but they have substantially proven their right to hold the property as factors, and to be paid out of the same. We think that judgment should be given in their favor. 9 *Martin, 317, Canfield et al. vs. McLaughlin.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

STATE OF LOUISIANA vs. JUDGE BERMUDEZ.

ON AN APPLICATION FOR A MANDAMUS.

The Supreme Court disclaims a general superintending control over the inferior jurisdictions; but it will exercise every power incident to its appellate jurisdiction, as defined by the constitution, and in the forms prescribed and established by the legislature.

The authority of the legislature must, however, be considered, in relation to the constitution, which allows this court appellate jurisdiction only, and in matters which have a tendency to aid this jurisdiction.

This court cannot direct inferior courts what judgments they are to render, but in cases in which it is their duty to proceed and take cognizance, they may be so directed, and their judgments appealed from, as in other cases. It is only in relation to courts acting judicially, and in cases in which an appeal might be prosecuted to this court after final judgment, that it will issue writs of *procedendo* or *mandamus*.

So, on a refusal of the judge of probates, on the application of the tutrix to appoint an under-tutor to her minor children, and order a family meeting, with a view to relieve her property from a general mortgage, and give a special one, a peremptory *mandamus* will be awarded requiring him to proceed.

It is the duty of the judge of the parish, where the minor has his domicile, to appoint an under-tutor as soon as a vacancy occurs.

This is an application for a *mandamus*, to be directed to the judge of probates for the parish and city of New-Orleans, commanding him to grant a certain order, and perform certain duties set forth in the following affidavit of the attorney of the widow Fortier, the applicant :

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"Madame Annette Lallande, widow of Adelard Fortier, deceased, now residing in the parish of New-Orleans, shows, that the late Adelard Fortier died in the parish of Jefferson, in June, 1833, and his succession opened in the court of probates for that parish ; that she was confirmed as the natural tutrix of her minor children, and Joseph Lallande was appointed under-tutor ; that she has rendered an account of her administration, as tutrix, which has been duly homologated by the Court of Probates for the parish of Jefferson ; according to which, the succession of Fortier is liquidated, and the portion of each of the minor children ascertained to be four thousand three hundred and sixty-two dollars.

"That since the death of her husband, she has removed with her minor children to the parish of New-Orleans, where she has resided for the last four years, and where she has since bought property in her own name ; that said Joseph Lallande, the under-tutor of said minors, has resigned his functions, and no under-tutor has been appointed ; that desiring to avail herself of the privilege granted to her by law to give a special mortgage on her property in favor of her children, and thereby avoid the general mortgage resulting from her tutorship, she has applied, by petition, to the judge of the Court of Probates for the parish and city of New-Orleans, where she resides, to have an under-tutor appointed to her minor children ; and also an order that a family meeting, composed of the nearest relations, be convened before a notary, according to law, to take into consideration the subject matter of said petition ; which said order, this affiant avers, the judge of probates refuses to grant, on the ground that the succession of Adelaide Fortier was opened in the parish of Jefferson, and he has no jurisdiction over the same, but the judge of the Court of Probates for the said parish of Jefferson, has exclusive jurisdiction."

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Grima, for the widow Lallande, applied for the *mandamus*, ordering the probate judge to grant the order for the family meeting, and appoint an under-tutor, on the following grounds :

1. That the appointment of tutors to minors, belongs to the judge of probates of the domicile or residence of the father and mother of the minors. *Code of Practice*, article 944.

2. In all cases concerning minors, the judge of the minor is the judge of the Court of Probates, within whose jurisdiction the minor resides. 2 *Moreau's Digest*, 59, section 8.

3. The domicile of the minor is that of the tutor. *Code of Practice*, 48.

4. The proceedings of a Court of Probates of a parish in which neither the minor, his tutor, nor under-tutor resides, are null and void. 9 *Martin*, 489.

Bermudez, J., showed cause in writing :

1st. That the Supreme Court was without jurisdiction to issue a *mandamus* in this case, because it possesses appellate jurisdiction only. *Constitution of Louisiana*, article 4, section 2.

2. The tutor is required to give bond and security, which is to be taken by the judge of probates, who has appointed or confirmed him in office. *Louisiana Code*, 330, 331, 3298, 3308 ; *Session Acts of 1830*, page 46, section 1 ; *Code of Practice*, 997.

3. The jurisdiction of this judge lasts as long as the tutorship, and cannot be avoided by the change of domicile. *Code of Practice*, 997.

4. The appointment of the family meeting must be made by the judge who appointed or confirmed the tutor. *Louisiana Code*, 307 ; *Code of Practice*, 997.

5. The Probate Court of the parish of New-Orleans, has neither the means nor the jurisdiction to ascertain and know the liabilities of the tutrix ; and the nearest relations and friends of the minors, whose father died in the parish of Jefferson, reside there, which is an additional reason why the probate judge of that parish should have the exclusive control of this matter.

G. B. Duncan appeared at the bar, and argued on behalf of the judge. EASTERN DIST.
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A re-argument, on a re-hearing, was had in this case.

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Eustis and *Grima*, for the applicant, on the re-argument, insisted that the Supreme Court had jurisdiction, and was competent to grant the *mandamus*.

1. That this was a Supreme Court of appellate jurisdiction, with a revisory power over the inferior tribunals, and to grant relief in all cases where justice and reason require it.

2. An appeal to the Supreme Court lies in all final decrees of the inferior courts, over which this court has appellate jurisdiction, in all matters of controversy where the amount exceeds three hundred dollars.

3. The refusal of the Court of Probates to appoint an under-tutor, and order the family meeting as prayed for, is a final decree of said court, and this court possesses the remedial power to prevent a failure of justice.

4. The article 4, section 2, of the Constitution of Louisiana, which declares that the Supreme Court shall have *appellate jurisdiction only*, must be construed, in contradistinction from original jurisdiction, and according to the laws in force in this country when the constitution was framed.

5. That whether the Supreme Court acts by *mandamus* or otherwise, in reviewing a case, it is not less in the exercise of its appellate jurisdiction, and that this appellate jurisdiction is merely exclusive of original jurisdiction.

6. The articles 828, number 2, and 838-9, of the Code of Practice, are declaratory of the legislative will, as to the construction of the Constitution of Louisiana, on the question of jurisdiction of the Supreme Court, as a court of appellate jurisdiction only.

Bullard, J., delivered the opinion of the court.

We have given to the question presented by this application, no ordinary share of attention and consideration. It is one which concerns the constitutional limits of our jurisdiction, and involves the inquiry, how far we are bound to exercise

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those powers expressly given to us by the Code of Practice, of issuing certain writs, addressed to inferior courts "for the purpose of insuring a better administration of justice," and particularly the writ of *mandamus*, as provided by article 838, of the Code of Practice, "where the judges of inferior courts are guilty of a denial of justice, or unreasonable delay in pronouncing judgment on causes before them, but also if they refuse or neglect to perform any of the duties required of them by law, or which may enable the superior courts to exercise their appellate jurisdiction." If the exercise of these powers be not forbidden by the constitution, we are bound to obey.

Our jurisdiction is declared to be appellate only. The essential correlative, in matters of appellate jurisdiction, is *original*. The constitution forbids, undoubtedly, the cognizance, by this court, of any case in the first instance. It pre-supposes the action of some other court, and the revision, by this, of its proceedings; or, at least, the application to some other tribunal for its judicial action, and a refusal to act. To adopt the language of chief justice Marshall, "it is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings, in a cause already instituted, and does not create that cause." *1st Cranch*, 175.

We do not doubt the authority of the legislature to regulate the exercise of this appellate power, in all civil cases in which the matter in controversy exceeds three hundred dollars. It is competent to introduce new forms of proceedings, by which the judicial acts of other courts, in such cases, may be revised in this, and is not restricted to an appeal, technically so called, as the exclusive form. Cases may well be supposed, in which a formal appeal could not be taken, and the judgment of the appellate court pronounced, after hearing both parties, from the impossibility of making an appellee. Suppose an application to a judge for an order of seizure and sale, in cases where the law allows it in the first instance, and he declines to act at all. Our judicial system would be imperfect, if the errors of a judge, in such a case, could not be corrected. Yet the remedy, by appeal, in the form

now prescribed, might not be applicable, as the case presupposes that no final judgment has been rendered. Such an application is essentially a suit on a case, in which the party seeks a remedy in a court of justice, which the law affords him.

Among the first judgments pronounced by this court, was that by which it disclaimed a *general superintending control* over the inferior jurisdictions. *Laverty vs. Duplessis*, 3 *Martin*, 42 and 54. We still disclaim such authority, but we are bound to exercise every power incident to our appellate jurisdiction, as defined by the constitution, and in the forms and manner established by legislative authority. The right to issue a *mandamus* to courts of inferior jurisdiction, has always been asserted, whenever such mandate became necessary for the exercise of the appellate jurisdiction of this court.

In the case of *Winn vs. Scott*, this court said that the expressions of the Code of Practice seem to embrace all possible cases, but the authority there granted, must be considered in relation to the Constitution, which allows this court appellate jurisdiction only, and its mandates must be confined to matters which have a tendency to aid that jurisdiction. 2 *Louisiana Reports*, 38.

We certainly cannot, in any case, direct the inferior courts to render a particular judgment, or what judgments they shall render. But in cases in which, in our opinion, it is their duty to proceed, and take cognizance of a case, we may so direct; and if the judgment afterwards rendered, or order given, be appealed from, we have a right to render such judgment ourselves, as the justice of the case may require; and if the order be a preliminary one, and necessarily *ex parte*, we see no good reason why the appeal should not be of the same character. It is only in this way, we can give effect to the provisions of the code in question, and proceed to settle questions of jurisdiction without a formal appeal in the forms now established by other provisions of the code. But it is only in relation to courts, acting judicially, and in cases in which an appeal might be prosecuted to this court,

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The Supreme Court disclaims a general superintending control over the inferior jurisdictions; but it will exercise every power incident to its appellate jurisdiction as defined by the constitution, and in the forms prescribed and established by the legislature.

The authority of the legislature must, however, be considered in relation to the constitution, which allows this court appellate jurisdiction only, and in matters which have a tendency to aid this jurisdiction.

This court cannot direct inferior courts what judgments they are to render, but in cases in which it is their duty to proceed and take cognizance they may be so directed, and their judgments appealed from, as in other cases.

It is only in relation to courts acting judicially, and in cases in which an appeal might be prosecuted to this court after final judgment, that it

EASTERN DIST. after final judgment, that we feel ourselves authorized to
February, 1840. issue writs of *procedendo*, or *mandamus*.

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 will issue writs
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In the case which now presents itself, the judge of probates declines to take cognizance of an application, by a tutrix, for the appointment of an under-tutor to her minor children, and for the convocation of a family meeting, with a view to relieve her property from the general legal mortgage in favor of the minors, on offering other adequate security. The grounds stated by the judge, in his answers to the rule, are, in substance, that, although the domicil of the minors may have been changed since the confirmation of the tutrix, yet the judge of probates of the parish, by whom the appointment was made, and the security was received, still retains exclusive jurisdiction in relation to any change in the security, or the convocation of a family meeting; that the jurisdiction of this judge lasts as long as the tutorship, and cannot be avoided by the change of domicil.

So, on a refusal of the judge of probates, on the application of the tutrix, to appoint an under-tutor to her minor children, and order a family meeting, with a view to relieve her property from a general mortgage and give a special one, a peremptory *mandamus* will be awarded, requiring him to proceed.

It is the duty of the judge of the parish where the minor has his domicil, to appoint an under-tutor as soon as a vacancy occurs.

It appears to us, the principal and material inquiry is, whether the judge of probates of the parish of Orleans is bound to appoint an under-tutor to minors whose domicil is in his parish. That is the first step to be taken, for the proceedings, in relation to the security to be given by the tutors, and must be carried on contradictorily with the under-tutor.

We have no doubt that the judge is bound to proceed and appoint an under-tutor, as soon as a vacancy occurs. It is the judge of the parish where the minor has his domicil, who is to make the appointment. *Louisiana Code*, 289.

The code appears to contemplate cases in which the general legal mortgage on the property of the tutor may be restricted, even during the tutorship, and where such restriction did not take place at the time of the appointment. *Louisiana Code*, 3308, 3309.

It is, therefore, ordered, adjudged and decreed, that the judge of the Court of Probates proceed to take cognizance of the plaintiff's petition, and to make an appointment of under-tutor, according to law.

WHITNEY ET AL vs. OCEAN INSURANCE CO.

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March, 1840.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE BUCHANAN PRESIDING.WHITNEY ET AL.
vs.
OCEAN INS. CO.

It is the duty of captains of steam-boats passing in and out of the mouth of the Mississippi, on arriving at the pilotage ground, to take on board a regular commissioned or competent pilot : otherwise it is a breach of the warranty of insurance which will discharge the underwriters.

It is not sufficient to show that the captain of the boat was skillful and experienced, to discharge the insured from their warranty of seaworthiness when the boat has been lost without taking a pilot on board.

This is an action by the owners and agents of the steam-boat Convoy, on a marine policy of insurance in the usual form, executed by the defendants, insuring said steam-boat on her voyage at and from New-Orleans through the mouth of the Mississippi river to Mobile and back. On her return voyage, and in endeavoring to enter the mouth of the Mississippi without taking one of the regular commissioned pilots, or any other but those belonging to the boat, she struck on the breakers and was entirely lost ; and, as is alleged, by the perils insured against. The plaintiffs further show, that the defendants have become liable for the amount of the insurance, after deducting sales of the wreck, leaving nine thousand three hundred and sixty-two dollars, for which they pray judgment.

The defendants denied any liability as insurers ; because the captain of said steam-boat, omitted and neglected to take on board a pilot on returning and entering the mouth of the Mississippi, a place of great difficulty and danger ; and that said boat was, in consequence, unseaworthy on said voyage at the time of the loss. They pray to be discharged from suit, and all liability.

Under these pleadings and issues there was a mass of testimony taken to show that the captain was skillful, and that the boat was not lost through any negligence, or in fact, for the

EASTERN DIST. want of a pilot. That it was not the usage and practice for
March, 1840. Mobile boats to take on board the pilots commissioned and
 WHITNEY ET AL. stationed at the mouth of the river. The cause was finally
 vs. submitted to a jury under the direction of the court, who
 OCEAN INS. CO. returned a verdict for the plaintiffs, allowing them the sum
 claimed. The defendants appealed from the judgment rendered on said verdict.

Benjamin, for the plaintiffs :

1. The seaworthiness of a vessel is always presumed, and the burden of proof of unseaworthiness is on the assurers. *1 Phillips, 116, and cases there cited.*

2. If, then, the question of seaworthiness be left in doubt, plaintiffs must recover ; but the evidence is conclusive in their favor, and was so considered by the court and jury. It is not usual to take a pilot in the navigation in which plaintiffs' boat was engaged, and if usual, the captain is proved to have been a most skillful pilot.

3. The necessity for taking a pilot is matter of usage, dependent on the custom in the particular navigation in which the vessel is engaged. *See 1 Phillips, 115-16 ; 2 Phillips, 117-18, and particularly the case there cited from 6 Cowen's Reports, page 270.*

4. The judge's charge to the jury was in conformity with the principles above stated, and was rather unfavorable to the plaintiffs. Defendants have, certainly, no reason to complain of it.

C. M. Conrad, for the defendants :

1. That vessels entering or going out of the mouth of the Mississippi are bound to employ a pilot, both by general usage and by positive law. *See law of 1805, section 5, 1 Moreau's Digest, 513 ; section 17, Ibid., 517 ; section 20, Ibid., 518 : Law of 1826, passim, Ibid., 520-21, &c. ; Law of 1837, Session Acts, No. 106, page 101.*

If the plaintiffs relied on a special usage, excepting vessels trading to Mobile from this custom, they should have proved the existence of such an usage. But none such has been

proven, unless the frequent attempts of captains of steam-boats to evade the law and defraud the pilots of their just dues, are entitled to be called by that name.

2. If the insured was bound to employ a pilot, he was not discharged from that obligation by showing that the captain was an experienced navigator and was acquainted with the particular navigation. The vessel was bound to be provided with a competent captain, as well as with a competent pilot; but these two officers are distinct, and, a compliance with one of these obligations was not a compliance with the other. It would be extremely dangerous to allow the doctrine, that the obligation of the insured to employ a pilot when the aid of one is necessary, depends on the greater or less experience and skill of the captain. This would always be a question of fact of difficult decision, and would open the door not only to litigation, but to numberless frauds against shippers and underwriters. *Hughes on Insurance*, 200, 201.

3. The obligation of the master to employ a pilot, where it is necessary or usual to employ one, is in the nature of a warranty, the mere breach of which discharges the underwriter, even though the loss be not occasioned by that breach. *Hughes on Insurance*, 199, 233; *Marshall on Insurance*, vol. 1, p. 165-166.

But the present case is a very strong one for defendants, for the breach was willful, inasmuch as a pilot offered his services and they were rejected; and, as the loss was occasioned by the want of one.

Morphy, J., delivered the opinion of the court:

This is a suit on a policy of insurance on the steam-boat Convoy. The insurance was for a voyage from New-Orleans to Mobile and back to this port. On her homeward trip, and when about entering the mouth of the Mississippi, the boat was lost, as is alleged by the perils insured against, to wit: the perils of the sea.

The only question here turns on the seaworthiness of the boat, for not having had on board a competent pilot at the time the accident happened by which the boat was lost; sea-

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worthiness is an implied warranty in every policy of insurance ; to constitute it, a vessel must not only be tight, staunch and strong, but must be provided with every thing necessary for the purposes of safe and secure navigation. It is a question of some mercantile interest, and comes before us, we think, for the first time.

The testimony shows that the *Convoy*, on her outward trip to *Mobile*, took a pilot at the *Balize*. That when returning to this port, she was hailed by a regular pilot-boat at about eleven o'clock in the night and at a distance of twenty miles off the *Mississippi* ; that on the offer of a pilot, the captain answered that he had no use for one, but that his boilers being damaged and out of order, he requested the pilot-boat to keep alongside of him until daylight, lest he should be blown to sea ; that the offer of a pilot was once or twice repeated, and again refused by the captain ; that after giving the course and distance to the light-house, the pilot-boat left the *Convoy* ; that the next morning at about three o'clock, the boat reached the *Balize*, came to anchor, and shortly afterwards attempted to cross the bar without waiting for a pilot, or making any effort to procure one ; that, in this attempt she struck on one of the outermost breakers and there went to pieces.

There is some contrariety of evidence as to the immediate cause of the loss of this boat. The witnesses for the plaintiffs say, that it was owing entirely to the want of steam and sufficient sails to stem the current at the entrance of the *Mississippi* ; that in consequence of this innavigability of the boat, she drifted while in the channel and in the very act of going over the bar ; while the defendants witnesses testify that, inasmuch as the boat had been able to sail about twenty miles from the place where she was offered a pilot to the *Balize*, any regular pilot could have taken her safely into the *Mississippi* that very night, because the weather was clear and the draft of the boat light, and that the running aground on the outermost breaker from the bar, can only be imputed to the inexperience of those who undertook to bring her in the next day : but for the purposes of this inquiry it matters

not absolutely what was the immediate and true cause of this accident. The question before us, is ; has there been, in this case, a breach of the implied warranty of seaworthiness from the want of a competent pilot on board ? If there has been such a breach, whether the loss has been the immediate consequence of it or not, provided it can by any reasonable probability be ascribed to it, the underwriters are discharged from all liability. 2 *Phillips on Insurance*, 118 ; *Hughes*, 308 ; 1 *Marshall*, 165.

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The general rule is that in every well appointed port, where pilots are to be had, a vessel arriving upon pilotage ground is bound to take one. The duty is the more imperative on the approach to a river of difficult access where the navigation requires not only nautical skill, but local knowledge and constant practice. There are few states provided with as good a system of pilotage as we have ; the attention of our general assembly has been turned to the subject at a very early period, and from its importance it has been legislated upon from time to time up to the statute of 1837, which embodies most of the regulations to be found in the former enactments in relation to pilotage. It provides that branch-pilots shall be appointed, not to exceed fifty in number ; that they shall be citizens of the United States ; shall have resided two years in the country ; shall undergo an examination ; give security for their good behaviour, and be commissioned by the state ; their duties are pointed out, and the rates of pilotage fixed ; and it is made penal for any person not being a branch-pilot, to pilot any ship or vessel in or out of the Mississippi when a branch-pilot offers, &c.

Under a system of pilotage thus organized, it has not been, nor can it be denied, that the laws and usages of this port contemplate that all masters of vessels, when coming in or going out of the Mississippi, are to take a pilot on board, whenever it is practicable for them to procure one. There are, undoubtedly, cases in which the masters, for the safety of their ships, must take upon themselves to navigate them into the river without the assistance of a pilot. These cases must form exceptions to the rule, and must be adjudicated upon

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according to their peculiar and respective circumstances. In the present case no stress of weather is alleged; no effort is shown to have been made to procure a pilot on the day the boat was lost; it appears on the contrary, that the services of one had been repeatedly refused the preceeding night. But the plaintiffs contend that they have discharged their warranty to the underwriters as relates to a pilot being on board, because the captain of the boat was skillful and experienced, and that it is not usual for steam-boats trading between this port and Mobile to employ the commissioned pilots. This particular usage, tending so materially to diminish the security held out to the underwriters under the customary pilotage as regulated by law, should be established clearly and beyond contradiction, and should be shown to have been acquiesced in by those who are to be affected by it. In support of such usage, the record exhibits the declarations of several captains of steam-boats; they say that it is not customary for a majority of the steam-boats engaged in the Mobile trade, to take in pilots at the Balize; that they have never employed them, or at least very seldom; and that they believe themselves as competent and as well acquainted with this navigation as any commissioned pilot. On the other hand, the defendants' witnesses represent the usage of taking pilots at the Balize as general and common to steam-boats as well as other vessels; they say that sometimes the Mobile steam-boats steal out of the river by the pass a la Loutre, to avoid taking a pilot, and that frequent accidents have been the consequence of such a course of conduct. That it is a matter of rare occurrence for steam-boats to go out or come into the river without employing a pilot like all other vessels; and that on her outward trip, the Convoy herself conformed to this general usage by taking a pilot: the agent of the pilots testifies that he has collected pilotage fees from steam-boats as from other vessels. Thus it is seen, that this usage invoked by the plaintiffs is far from being firmly established, at least not so as to warrant the presumption that insurances are effected in reference to it. The competency of the captain is attested by two seamen who have sailed under his command

at different times ; they declare him to be skillful, experienced, and well acquainted with the navigation of this river. In a port like this, where there are regular pilots commissioned by the state for the safety of our shipping, our insurance offices have a right to expect that the insured will avail themselves of their services and experience. Nothing short of the most positive and uncontradicted proof of a particular usage with regard to steam-boats in the Mobile trade, could induce us to say that the insured can discharge their warranty of seaworthiness to the insurers, by administering proof of the supposed knowledge and experience of a captain where his boat has been lost without having a pilot on board, and it was practicable to procure one. The competency of a captain would in every case be established by that kind of evidence, which is the easiest to be obtained and the least to be trusted, to wit : the opinions which men of the same calling are always found willing on occasions of this sort, to express in favor of each other. Whatever may be our respect generally for the finding of juries in matters of fact ; yet, when we disagree with them, it is our province, nay, our duty, to correct their errors of fact as well as of law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed ; and that ours be for the defendants, with costs in both courts.

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SHAUM
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SHAUM VS. STRONG.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

When there is no evidence to the contrary, the owners of a steam-boat will be deemed commercial partners, and bound *in solido* for her debts.

So, where the captain gave his due-bill to the engineer of a steam-boat for balance of wages due him, the defendant, as one of the owners, was held liable for the amount of the claim.

EASTERN DIST. The defendant is sued as one of the owners of the steam-
 March, 1840. boat Columbia, for the balance of a claim for wages due the
 engineer, evidenced by the following due bill of the captain :

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"Due Mr. William Shaum four hundred and seven dollars and ninety-three cents, being for balance of wages due him on steam-boat Columbia, up to 19th July, 1837.

C. C. WATERMAN,

For owners of steam-boat Columbia."

The defendant denied being part owner, or that he was a commercial partner, or that Waterman was authorized to bind the owners, or did so ; that there was no amicable demand.

The plaintiff proved his demand, and that the defendant was one of the owners of the boat at the time the due bill was given, and that Waterman was captain.

There was judgment for the plaintiff, and the defendant appealed.

Ives, for the plaintiff, prayed the affirmance of the judgment with ten per cent. damages, as a delay case.

Lockett and *Micou*, insisted, there was no evidence that the steam-boat carried freight or passengers, or that her owners were commercial partners.

Morphy, J., delivered the opinion of the court.

The defendant is sued as one of the owners of the steam-boat Columbia, on a due bill given to the plaintiff, for a balance of his wages, as engineer of said boat, up to the 19th of July, 1837. This obligation is signed by one C. C. Waterman, as captain of the boat and agent for the owners. On the evidence adduced below, judgment was given for the plaintiff, and the defendant appealed.

The only point made in this court is, that the record shows no evidence that the Columbia carried any freight, or that her owners were commercial partners ; that defendant is owner only of three-fifths of the boat, and should have been decreed to pay only that proportion of the claim.

It is true, that under the decisions of this court, the bare circumstance of persons being the joint owners of a boat, does not make them responsible *in solido*, because, as was said in *David vs. Eloi et al*, 4 *Louisiana Reports*, 106, several persons may become owners of a boat for other purposes than carrying personal property for hire. She may be bought on speculation, with an intention of re-selling her. She may be chartered out, and while she remains joint property, never be used to carry goods. But these, and other cases of this kind, are of extremely rare occurrence, and must be made out by proof, to destroy the natural and violent presumption, that steam-boats are used by their owners for the purposes for which they are generally built or acquired. Although there is no express or positive testimony on this head, the record shows, we think, sufficient *prima facie* evidence of the objects to which the *Columbia* was applied by her owners, when it informs us that the boat had been running for account of the defendant and Calvert, his co-proprietor, up to the time when this due bill was subscribed and delivered to plaintiff for his services on board of her as engineer. We may well presume and believe, unless the contrary is shown, that she had been doing that kind of business which steam-boats are almost universally employed in, to wit: carrying personal property for hire. But, independent of the solidarity which would result from the nature of defendant's partnership with Calvert, we find in the record an absolute promise to the plaintiff, by defendant, to pay the amount of his claim, without any restriction or reservation as to his liability only for a portion. This alone, was, perhaps, sufficient to authorize a recovery in this suit. At all events, it corroborates the view we have taken of the defendant's legal responsibility for the whole. Damages have been prayed for by the appellee. We do not deem this a proper case for awarding any.

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vs.
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When there is no evidence to the contrary, the owners of a steam-boat will be deemed commercial partners, and bound *in solido* for her debts.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed, with costs.

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March, 1846.

EDSON
vs.
JACOBS.

EDSON vs. JACOBS.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

Notice to the endorser, left at his office with a clerk, he not being in, is sufficient to render him liable.

The defendant is sued as endorser of a note; and pleaded a general denial and want of legal notice.

The plaintiff gave in evidence on the trial the note, protest and certificate of the notary, who states that he gave notice of protest on the same day to the defendant, by "delivering it to a clerk at his office, he not being in."

There was judgment against the defendant, and he appealed.

I. W. Smith, for the plaintiff.

Josephs, contra.

Martin, J., delivered the opinion of the court :

This is an action against the endorser of a promissory note, and the only defence is, want of legal notice.

The notary has certified that he gave the notice on the day of protest, "to a clerk at the defendant's office, he not being in." A demand at the defendant's office, was held good in the case of *Miller vs. Hennen*, 3 *Martin, N. S.*, 587, although the note was made payable at his house. The case of a notice is still more favorable; and when left at the office where the defendant transacts his business, is sufficient to charge him as endorser.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs in both courts.

DWIGHT ET AL. VS. SCATES.

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DWIGHT ET AL.

VS.

SCATES.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Notice of trial may be served on the *counsel* of the defendant, and it is sufficient.

Where a witness swears *positively* to a signature, without being interrogated as to his means of knowledge, it is sufficient. It would be otherwise, if he was interrogated, and failed to give a satisfactory answer.

This is an action against the acceptor of a bill of exchange.

There was an exception and plea to the jurisdiction of the Commercial Court, averring, that the defendant resided in the parish of Jefferson, and out of the jurisdiction of the court. Notice of trial was served on the defendant's counsel, and the plea or exception overruled on an *ex parte* hearing, the defendant's counsel not attending.

The defendant pleaded the general issue, and reserved the benefit of his plea to the jurisdiction.

The cause was fixed for trial by the plaintiffs, and notice served on the *counsel* of the defendant.

At the trial, the defendant's counsel failed to appear.

The plaintiffs called a witness, who swore that "the signature or endorsement of C. J. Henshaw, (the payee of the draft) to the note sued, is that of C. J. Henshaw."

On this evidence, and the production of the draft, the plaintiffs had judgment, from which the defendant appealed.

Elmore and *King*, for plaintiffs and appellants, prayed the affirmance of the judgment, with damages.

Lockett and *Micou*, contra, insisted that the defendant had not been properly and legally notified of the time and place of trial, either on his plea to the jurisdiction of the court, or on the merits; and that both were improperly tried in his absence.

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2. That the testimony of the witness, as stated in the record, is not legal evidence of the signature of the endorser, under whom the plaintiffs hold the draft.

Martin, J., delivered the opinion of the court.

The defendant and appellant is sued as the acceptor of a bill of exchange, and seeks the reversal of the judgment against him on two grounds :

1. That his plea to the jurisdiction of the court was improperly tried in his absence, and without his having had legal notice of trial.

2. The signature of Henshaw, the payee of the bill, and the plaintiffs' endorser, is not legally proven.

Notice of trial may be served on the counsel of the defendant, and it is sufficient.

Where a witness swears positively to a signature, without being interrogated as to his means of knowledge, it is sufficient. It would be otherwise if he was interrogated, and failed to give a satisfactory answer.

I. As to the plea to the jurisdiction, the notice of the day fixed for trial, was served on the defendant's attorney. It is contended, that it ought to have been served on the defendant himself. The rules of the Commercial Court are not before us. But the circumstance complained of, was presented to the consideration of the judge, in a motion for a new trial, and he held that the notice was regular.

II. Henshaw's signature was proved by a witness who did not state by what means he had acquired a knowledge of Henshaw's hand-writing. Had the witness been interrogated as to those means, and failed to give a satisfactory answer, his testimony must have had no weight. But the manner in which he swore, made him obnoxious to the penalty of perjury, if, in reality, he had no knowledge of the hand-writing of the endorser. This, in our opinion, is sufficient to entitle him to credit, if the party against whom he is offered, did not see fit to examine him, in regard to his means of knowledge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

KIRKPATRICK vs. M'MILLEN ET AL.

EASTERN DIST.
March, 1840.APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.KIRKPATRICK
vs.
M'MILLEN ET AL.

Where several lots are sold in block, designated by numbers, in a particular square, according to a plan, although the number of feet contained in each is specified, it is a sale *per aversionem*. The reference to the plan and boundaries of the streets must control the measurement of the lots.

In a sale *per aversionem*, notwithstanding the deficiency in the superficial quantity, the purchaser cannot claim a diminution in price.

This is an action against the maker and endorsers of a promissory note, given for part of the price of certain lots.

The defendants averred, that said lots were since sold by them to Sewell and Clannon, who assumed the payment of the note sued on, and pray that they be called in warranty, and required to pay the same.

The warrantors appeared and demanded a diminution of price in consequence of a deficiency in the quantity or measurement of said lots, and prayed to be allowed a sum proportioned to this diminution, in compensation and reconviction. The defence was not sustained. Judgment was rendered against the defendants; and in their favor against the warrantors for the amount of the plaintiff's demand. The defendants and warrantors all appealed.

F. B. Conrad, for the plaintiff.

Roselius, M'Millen and Grivot, for the defendants.

Benjamin, for the warrantors.

Bullard, J., delivered the opinion of the court :

This is an action by the payee against the maker and endorsers of a promissory note. The consideration appears to have been certain town lots purchased from the plaintiff by the makers of the note, who, in the mean time, sold the lots to Sewell and Clannon, who assumed to pay the notes

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sued on. The second purchasers were made parties as guarantors, and the original defendants claim a judgment over against them *in solido*, according to their contract. *Code of Practice, article 379.*

The warrantors set up as a defence a deficiency in the measurement of the lots, and claim a diminution of price. But the court being of opinion that the sale was *per aversionem*, gave judgment against the original defendants for the amount of the note, and a judgment over against the warrantors for the same amount, and all the defendants have appealed.

The lots which formed the object of the sale are described substantially as follows: "No. 5 in square No. 32, situate in the faubourg St. Mary, measuring sixty feet front on St. Paul-street, by one hundred and twenty feet, all French measure." The one half of another lot of ground "No. 6, situate in the same square and faubourg, being the southern half thereof, measuring thirty feet front on St. Paul-street, by one hundred and twenty feet, French measure." Two other certain lots of ground "No. 9 and 10, situate in the same square and faubourg, and lying in the rear of lots No. 5 and 6, measuring sixty feet front on Girod-street, by one hundred and twenty deep, French measure." "The whole as per plan made by John Gravier, and deposited in the first judicial district court of this state."

Two of the lots are described as fronting on Girod-street, and the others on St. Paul. They are, therefore, represented as bounded by those two streets, and as lots designated on a particular plan of the faubourg. If the description of each lot were taken by itself, it would not, perhaps, come within the definition of a sale *per aversionem*. It is shown that, in point of fact, the square is less than two hundred and forty feet from St. Paul to Girod streets; and, consequently, there is a deficiency in the depth of each lot. But the whole of the lots were sold in block, designated by numbers, in a particular square, according to the plan of the faubourg. The reference to the plan and boundaries of streets must control the statement of the measurement of the lots. This case is analogous to that of *Milligan vs. Minnis*, 12 Louisiana

Where several lots are sold in block, designated by numbers, in a particular square, according to a plan, although the number of feet contained in each is specified, it is a sale *per aversionem*. The reference to the plan and boundaries of the streets must control the measurement of the lots.

Reports, and presents the converse of the proposition sanctioned by the court in the case of *Cuny vs. Archinard*, 5 *Martin, N. S.*, 243. Notwithstanding the deficiency in the superficial quantity, the purchaser cannot, therefore, claim a diminution of price.

The judgment of the District Court is, therefore, affirmed with costs.

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In a sale *per aversionem*, notwithstanding the deficiency in the superficial quantity, the purchaser cannot claim a diminution in price.

MAYOR ET AL. VS. CALDWELL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The defendant was sued on his promissory notes, given for a number of "city bonds," payable in twenty years, with six per cent. interest, in semi-annual dividends, which, being accidentally *lost* or *destroyed*, he asked for *new ones*, or a rescission of the contract: *Held*, that he was entitled to neither; but was bound to pay his notes, because the loss of the bonds did not diminish the city's obligation to pay them, and the interest as it became due.

This is an action against the defendant, on two of his promissory notes, given for a series, or twenty "city bonds," issued in negotiable form, payable in twenty years, with six per cent. interest, in semi-annual dividends.

The defendant resisted the payment of his notes, on the ground that in travelling to Mobile with eighteen of these city bonds in his trunk, which were obtained with the view of being sold for money, his trunk was accidentally taken out of the steam-boat, and was swept into the sea, and both it and the city bonds were forever lost or destroyed. He applied for new bonds, on showing the *loss*, and was refused. He expressly alleges, that the value of these bonds consisted

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in their transferability, and facility of sale in the money market; and that the inducement to make the contract with the city of New-Orleans, and give his promissory notes, with mortgage, at short dates, was, these public bonds, redeemable at the end of twenty years, with the certain expectation of selling them in market for cash, or money to be used as capital, in establishing his gas works in New-Orleans. The bonds were headed "gas bonds."

He demanded a rescission of the contract, and return of his notes, as the main inducement or consideration had absolutely failed; or, at all events, that new bonds, to the same amount, be issued to him.

The district judge refused both alternatives set up in the defence, and gave judgment for the plaintiffs. The defendant appealed.

Canon and *Deslix* contended, that the appellant was not exonerated from the payment of his notes by the loss of the bonds. The city would be compelled to pay them at maturity, on proving the loss.

Eustis and *Peirce* insisted, that the defendant had offered every thing in his power. He was ready, and proposed to indemnify or secure the city against loss, and receive new bonds, which was refused. He was without remedy, unless the contract was rescinded.

2. The main inducement to the contract had failed, which was the facility of transferring and selling the bonds for money. The cause of the contract which led to the obligations sued on had failed, and they consequently ceased to exist any longer, but had lost their binding force. *Louisiana Code, 1893.*

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment against him on his two promissory notes, and has based his hopes of relief on the following facts:

In the year 1834, he purchased from the plaintiffs twenty city bonds, of one thousand dollars each, payable in twenty

years, with six per cent. interest, payable semi-annually. The consideration of the sale was his five promissory notes, payable in one, two, three, four and five years from the date of the contract, bearing an interest of five per cent. He paid the two first notes, and part of the third.

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Afterwards, on a trip to Mobile, his trunk, which contained eighteen of these city bonds, was accidentally lost, or destroyed. The present suit is for the recovery of the balance of the third and the amount of the fourth note.

On these facts, the defendant resisted the claim of the plaintiffs, by a plea of reconvention, asking the rescission of the sale, or the delivery of new bonds in lieu of those lost or destroyed, tendering security at the discretion of the court.

The defendant's principal reliance is on the article 1893, of the Louisiana Code, which provides, that "if the contract consists of several successive obligations, to be performed at different times, and the equivalent is not given in advance for the whole, but is either expressly or impliedly promised to be given at future periods, then, if the cause of the contract corresponding to either of the successive obligations, should fail, the obligation depending on it, will cease also. Thus, in leases for years, the obligation to pay the yearly rent ceases, if the property which is leased should be destroyed."

The case to which this article is applicable, is that of a contract, in which the consideration fails, and we believe *absolutely*, as in the example given, which is that of a house taken on lease, and is afterwards destroyed.

The lease is dissolved by the loss of the thing leased. *Idem.*, 2699. But not by its *injury*. Thus, if a house be destroyed by fire, there cannot be a doubt but that the lease is at an end. But if it be only injured by a conflagration, the provision in the code, article 2687, that "the expenses of the repairs which this unforeseen event may render necessary, must be supported by the lessor," clearly implies, that the lease is not thereby at an end. This principle is more clearly illustrated by article 2667, which provides that "if, during the lease, the thing be *totally* destroyed by an unforeseen event, the lease is at an end." "If it be only

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destroyed *in part*, the lessee may either demand a diminution of the price, or a revocation of the lease."

In the present case, the loss of the bonds cannot deprive the plaintiffs of the consideration of the sale, because it does not diminish their obligation to pay the interest as it becomes due, and the capital at the time they engaged to pay it. It deprives the defendant of nothing but the facility of availing himself of his purchase by a transfer of the bonds. He may still transfer all his rights under them; although this cannot now be done with the same ease and equal advantage. His right has been injured, but not destroyed. It still exists against the plaintiffs for the payment of the interest and capital, at the stipulated periods. The sale, therefore, cannot be rescinded.

The creditor who has lost his debtor's bond, may, indeed, demand the amount of it, at maturity, but was never, in a court of justice, considered as authorized to demand a new one. Were we to direct the city to give new bonds, which the defendant demands, they might be lost, and give rise to a demand for others.

He who has lost a bond, may, indeed, demand that the debtor should not avail himself of the loss, to his injury; for no one ought to enrich himself at the expense of another. The loss must remain with the party on whom accident has placed it, and he cannot require that the party he dealt with should share it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ADAMS ET AL. vs. DAY.

EASTERN DIST.
March, 1840.. APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE WATTS PRESIDING.ADAMS ET AL.
vs.
DAY.

The attachment allowed by the act of 1826, in the case of a debt not yet due, was not intended as a means of bringing the debtor into court, but only as a conservatory measure.

Where the defendant in attachment shows, by *prima facie* evidence, that the facts stated in the affidavit are untrue, it will throw the burden of proving their verity on the plaintiff.

Where no notice is given of an assignment of a debtor's property, it is liable to attachment in his hands.

The plaintiffs instituted suit, by attachment, for the amount of a note due by the defendant, and for two *others not due*. They allege, in their petition, "that the defendants, S. & D. Day, reside in Philadelphia, and that an attachment has been levied on their property in this city, (New-Orleans) for said debt, *already due, and those not yet due*." They pray judgment for the debt due, and for the two remaining debts when they *become due*, and that the attachment continue in the meantime.

The attorney appointed to represent the defendants, took a rule on the plaintiffs, to show cause why the attachment should not be dissolved :

1. That the affidavit was incorrect, in point of fact, as regards the first and second notes, &c.
2. That the first note was paid, and now in possession of the defendant's attorney.
3. Because, at the time of issuing the attachment, the defendants were not about to remove their property from the state before the second note became due, nor has any of said property been removed.

The plaintiffs aver, in answer to this rule, that the act of April 7th, 1826, under which the attachment issued, does not give the right to set it aside, on the ground that the allegations on which the attachment issued are untrue.

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2. That since the levying the attachment, the defendants have made an assignment of their property in Philadelphia, and have no interest in this suit.

3. That the first note sued on, was due and unpaid, at the time of instituting this suit by attachment.

On the trial of the rule, the defendants showed by the testimony of their agent, and who was garnisheed as having the property attached in his hands, that there was no intention of removing it out of the state, but that it sold slowly, and it was necessary to sell the goods on time.

On the calling up of the rule for trial, the plaintiffs' counsel moved the court for a commission to Philadelphia, to take testimony to prove the assignment by the defendants, of all their property, since the issuing of the attachment, and with a knowledge of its existence. This motion was overruled by the court, on the ground, that, if proved, it would be a nullity, as between the present parties. The plaintiffs' counsel excepted to the opinion of the court.

The rule was made absolute, and the attachment set aside, so far as regards the first and second notes.

The plaintiffs appealed.

Maybin, for the appellants, urged the reversal of the judgment, on the grounds set up against the rule and proceedings, dissolving the attachment.

T. Slidell, for the defendants.

Morphy, J., delivered the opinion of the court.

An attachment was taken out for a debt not yet due, under the act of 1826, amending the Code of Practice, which limited the right of suing out attachments, to cases of debts actually due. The required affidavit was made, that defendants were about to remove their property out of the state before the maturity of the debt. A rule was taken on plaintiffs to show cause why the attachment should not be set aside, on the ground, that the facts set forth in the affidavit were untrue. On the evidence adduced below,

disproving the fact that the property attached was to be removed from the state before plaintiffs' debt became due, the judge dissolved the attachment, and the plaintiffs appealed.

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The appellants have contended, that, as the right to attach for a debt not yet due, was not originally given by the Code of Practice, but was conferred by a special provision of a posterior act, that, therefore, the relief for setting aside attachments unduly obtained, which is given by article 258, of the Code of Practice, does not extend to an attachment for a debt not yet payable, but must be limited to attachments falling within the original provisions of that code. This is a construction to which we cannot assent. It is contrary to the well established rule, that laws in *pari materia* must be construed with reference to each other. An amendment to an existing law, becomes as much a part of it, as though it had been embodied in the original law when it was made. As to the policy or equity of the distinction attempted to be drawn, we cannot perceive it. The remedy of attachment, is, in itself, a harsh and extraordinary one, and all the relief and protection accorded against its undue exercise for a debt past due, should *a fortiori* be granted for one not yet due, otherwise the debtor, who already owes a sum of money, and has violated his engagement to pay, would be more favorably treated than him whose obligation is prospective, and whose faith has not yet been violated. But the attachment allowed by the act of 1826, in the case of a debt not yet due, was not intended as a means of bringing the debtor into our courts, but only as a conservatory measure, to which the creditor can entitle himself only on administering proper proof of the fact, which may render it necessary for his protection, whenever they are denied, or disproved, by *prima facie* evidence. In this case, there has been, on the part of defendants, a sufficient showing, in opposition to the affidavit, to throw on plaintiffs the burden of proving its verity. This, they have not even attempted to do. It would be vexatious, indeed, if creditors were allowed, on a mere affidavit, not to be controverted, to attach the property of

The attachment allowed by the act of 1826, in the case of a debt not yet due, was not intended as a means of bringing the debtor into court but only as a conservatory measure.

Where the defendant in attachment shows, by *prima facie* evidence, that the facts stated in the affidavit are untrue, it will

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persons, who, in strict contemplation of law, are not their debtors.

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throw the bur-
den of proving
their verity on
the plaintiff.

Where no no-
tice is given of
an assignment of
a debtor's pro-
perty, it is liable
to attachment in
his hands.

We find in the record, a bill of exceptions to the refusal of the judge to grant plaintiffs a commission to Philadelphia, to obtain proof that defendants, since the issuing of this attachment, and with a knowledge of its existence, made an assignment of their property to assignees in that city. The judge, we think, did not err. Such an assignment, if proved, would be a nullity as between the plaintiffs and defendants here, for so long as no notice is given of an assignment of the debtor's property to the person who holds it, the property is liable to attachment in the hands of the latter. In this case, plaintiffs' own affidavit to obtain the commission, shows, that the attachment was anterior to the assignment; but it is said, that although the assignment cannot defeat the plaintiffs' rights, yet it has so far divested defendant's title to the property attached, as to leave him without sufficient interest to take any rule or action in relation to it. The delivery of the property in Louisiana was necessary, to complete the assignment. Until then, the defendants and assignors had, we believe, such an interest, as would make them at least competent to appear and protect the property from unlawful attachment by others.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN, PRESIDING.

Where one guaranties the payment of an existing debt, the obligation he contracts is essentially one of suretyship, in whatever form of words it may be clothed.

So, whatever may be the character of the primitive obligation, whether an endorsement or other commercial engagement, the guarantor's accessory obligation does not partake of its commercial character, but is absolute, if the debt is not paid.

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The guarantor of a note endorsed by another, is not entitled to notice of protest in order to make him liable.

Contracts of guaranty of existing debts, entered into in this state, are to be construed in reference to the municipal law, or Louisiana Code, and are not regulated by the *lex mercatoria*.

So, in this case, the defendant guarantied the payment of a promissory note, and became the surety of the makers, although it does not appear the latter were acquainted with his engagement.

The defendant as guarantor, cannot claim to be discharged from liability by the neglect of the plaintiff to give him notice of a demand and non-payment.

This is an action against the guarantor of a promissory note. The plaintiffs are the payees and holders of this note signed by Ripley & Thorn, dated the 30th January, 1836, payable fifteen months after date.

After the execution of the note, to wit., on the 3d of February, 1836, the defendant, R. H. Thorn, gave a written obligation as follows :

"I hereby guaranty to Messrs. Gasquet, Parish & Co., the payment of Ripley & Thorn's three notes of date in their favor, &c."

The last of these notes was protested for non-payment, and the plaintiffs looked to the guarantor.

He denies his liability or indebtedness to the plaintiffs.

The district judge was of opinion the obligation of the guarantor of a particular note was similar to that of an endorser, and he is entitled to strict notice of demand and non-payment, which was not given in this case. There was judgment for the defendant as in case of non-suit; and the plaintiffs appealed.

Wharton, for the plaintiffs and appellants, contended :

1st. In a suit against a guarantor of a particular note, it is not necessary to prove notice to him of the protest of the note guarantied. He is bound without any notice.

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2d. If notice be necessary, it must be on the same grounds that it is given to the drawer of a bill of exchange, or endorser, that either may be enabled to pursue the maker, or acceptor, and to secure himself.

3d. Notice is either waived voluntarily or by operation of law; insolvency of the maker of a note, in some cases, excuses notice to the guarantor.

L. Peirce, contra, insisted there was no error in the judgment. That the liability of a guarantor must be decided by the *lex mercatoria*, and that he is entitled to strict notice of default of payment.

Bullard, J., delivered the opinion of the court.

This is an action to recover the amount of a promissory note, drawn by Ripley & Thorn to the plaintiffs' order, upon a written engagement of the defendant, not a party to the note, to guaranty the payment of it, together with two other notes of the same date. The answer contains nothing more than a denial of indebtedness. The District Court being of opinion that the obligations of the guarantor of a particular note, are similar to those of an endorser, *i. e.*, to pay in case of non-payment by the previous parties, provided demand is made and due notice given of default; and, no such notice being shown in this case, gave judgment against the plaintiffs as in case of a non-suit, and they appealed.

If the liability of the defendant were to be tested by the law as settled by the Supreme Court of the United States, the conclusion to which the District Court came, would be, perhaps, fully supported. But a difficulty meets us at the threshold of this inquiry, to wit: according to what system of laws are the obligations of the parties to this contract to be governed? Did they contract with reference to the municipal law of Louisiana, or to the *lex mercatoria* as expounded by the highest court of the union? And, does there exist an important difference between those two systems? Does the contract in question present any features essentially different from that of suretyship, as defined by the Civil Code?

There is a marked difference between a letter of credit, contemplating a future engagement on the part of its bearer, for which the writer becomes responsible, and the promise to guaranty the payment of an existing debt contracted by another. The former is treated by the best writers on the civil law, as embracing essentially the contract of *mandatum*; the person to whom the letter is addressed, and who acts under it, being regarded in a qualified sense as the mandatory or agent of the writer, and hence arises the obligation of the latter to indemnify him. "It is, says Pothier, of the essence of the contract of *mandatum*, that the *mandator*, or principal, should have the will or intention at his own risk, to confide to the mandatory the affair which forms the object of the contract and to engage to indemnify him, and that the mandatory should have the will to undertake the affair. It is this mutual will which constitutes the contract. It is this, also, which distinguishes the *mandatum* from the simple recommendation; for, when I recommend to you a person, we contract towards each other no sort of obligation." The author proceeds to illustrate these principles by a variety of examples. *Pothier Contrat de Mandat, No. 18 et seq.*

These principles of the Roman law lie at the foundation of all guarantees of a prospective character, and are believed to be of universal application. But on the other hand, when one accedes to the existing obligation of another, and engages or promises to see it performed, he becomes essentially a surety; the contract entered into is that of suretyship, in whatever form of words it may be clothed; whether the words guarantor, or security, or surety be used, we look to the essence rather than the form. Our own code contains clear and distinct provisions on this subject, with reference to which contracts of that character entered into here and to be executed here, must be governed. The definition of suretyship in the code is sufficiently broad to embrace the case now before us. It is defined to be "an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not." Article 3004.

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Where one guarantees the payment of an existing debt, the obligation he contracts is essentially one of suretyship, in whatever form of words it may be clothed.

So, whatever may be the character of the primitive obligation, whether an endorsement or other commer-

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cial engagement the guarantor's accessory obligation does not partake of its commercial character, but is absolute, if the debt is not paid.

The guarantor of a note endorsed by another is not entitled to notice of protest, in order to make him liable.

Contracts of guaranty of existing debts, entered into in this state are to be construed in reference to the municipal law, or Louisiana Code, and are not regulated by the *lex mercatoria*.

So, in this case, the defendant guarantied the payment of a promissory note, and became the surety of the makers, although it does not appear the latter were acquainted with his engagement.

The defendant, as guarantor, cannot claim to be discharged from liability by the neglect of the plaintiff to give him notice of a demand and non-payment.

Whatever may be the character of the primitive or principal obligation, whether it be an endorsement or acceptance of a bill of exchange, or other engagement clearly commercial, and to be regulated by the *lex mercatoria*, it is not logical to conclude that the accessory obligation by which a third person warrants or guaranties its performance, partakes of its commercial character, and is to be construed by the same system of laws. If A, at my request, and under my guaranty, has endorsed the note of my friend, it does not follow that I am entitled to notice of protest in order to make me liable.

Whatever might be considered in other states of the union to be the rights and obligations of the parties to the contract now under consideration, we are of opinion that they must be ascertained by our own municipal code. The contract is between two of our own citizens, and to be executed here; the payment of a promissory note at maturity was guarantied. The defendant, in our opinion, became the surety of the makers of that note, although it does not appear that the latter were acquainted with his engagement. Article 3007. If the defendant had claimed the privilege of discussion, we do not perceive how it could have been refused him; and he can only be released from his obligation to pay in some of the modes pointed out by the code. He is clearly not discharged from liability, by the neglect of the plaintiffs to give him notice of a demand and non-payment of the promissory note.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff recover of the defendant, nineteen hundred and sixty dollars and seventy-eight cents, with interest at ten per cent. from the 3d day of May, 1837, until paid, and costs in both courts.

KIMBALL *vs.* PLANT ET AL.EASTERN DIST.
March, 1840.APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.KIMBALL
vs.
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A garnishee has no right, as such, to plead for any of the parties litigating for the property in his hands. He is viewed as a stake-holder, whose duty it is to declare the truth, and if his declaration be controverted, to support it, and prevent any improper decision to his prejudice.

Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation.

This case was before the court at the last May term, on the appeal of the intervenors. *See Ante*, 10.

On the return of the case to the Parish Court, the plaintiffs, being satisfied with their judgment against the defendants, took a rule on Messrs. Chittenden and Bailey, who had been cited as garnishees, to show cause why judgment should not be rendered against them separately for amount sufficient to satisfy plaintiff's judgment against the defendant, or why Bailey should not deliver up the money, bills of exchange, notes, acceptances, rights and credits, which he acknowledges to hold as the agent of the assignees of defendants. The parish judge, after hearing the parties, and the evidence adduced, gave judgment for the plaintiff against Bailey, requiring him to pay over six hundred and one dollars and seventy-two cents, and the further sum of one thousand nine hundred and thirty dollars and fifty-eight cents, the amount he confesses he holds in notes and bills, by delivering them up, or their proceeds; with the further sum of two thousand and seventy-one dollars, the amount of Chittenden's note, which he has received; and that the plaintiff recover from L. Chittenden two thousand five hundred and eighty-six dollars, but be credited with any amount paid by the other garnishee, after satisfying the sum of six hundred and one dollars, and the amount of such notes as he may have collected, &c., reserving plaintiff's rights against Chittenden for other notes, contested in another suit, &c. The garnishees appealed.

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Johnson, for the appellants, contended :

1. The former judgment of this court decided this point only, that "a voluntary assignment, made in New-York by a commercial firm established there, and wherein credits in Louisiana are assigned, can defeat an attachment sued out by a New-York creditor, and executed upon those credits, before notice of the assignment had been given to the garnishee. The answer of Bailey (garnishee) shows, that he had notice of the assignment before the attachment. The property in his hands was, therefore, validly transferred, and not subject to plaintiff's attachment. *Louisiana Code*, 2612, 2613.

2. The answer of L. Chittenden, one of the garnishees, shows, that he owed defendants a sum of five hundred and fourteen dollars and fifty-six cents, open account, and several negotiable notes, payable to defendants or order. These notes could not be attached, except in the hands of the holders. Judgment should, therefore, have been given for the sum, on open account only, as against said Chittenden. 16 *Daranton*, number 505, page 516 ; 17 *Toullier*, 2 *Duvergier*, number 211, page 243.

3. The note of Chittenden, which was held by Bailey, and for which the court below gave judgment in favor of plaintiff against both garnishees, was never attached in the hands of either: not in the hands of Chittenden, because attachment in the hands of the maker of a negotiable instrument, cannot affect a *bona fide* holder; nor, in the hands of Bailey, because it was validly transferred, with notice of transfer, before the attachment was laid. The garnishees are not parties to the judgment against defendants and intervenors, except so far as their answers show that they have property in their hands, which ought to go to satisfy that judgment. The judgment of the court below against the garnishees, obliges them to pay, or surrender property which did not belong to defendants, and subjects them to the danger of paying the same twice. This judgment is, therefore, contrary to law and evidence, and should be reversed, for the protection of the garnishees.

Elmore and King, for the plaintiff and appellee, insisted on the affirmance of the judgment.

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Morphy, J., delivered the opinion of the court.

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This case came up last May term, on an appeal from a judgment of the Parish Court, dismissing the intervention of Perkins and Putnam, in this suit. The latter had claimed, under an assignment executed to them in New-York by defendants, certain notes and credits, attached by the plaintiff in the hands of Chittenden and Bailey, the present appellants. The judgment appealed from, was affirmed by this court, on the ground, that a voluntary assignment, made in New-York by a commercial firm established there, and wherein credits in Louisiana are assigned, cannot defeat an attachment sued out by a New-York creditor, and executed upon those credits, before notice of the assignment had been given to the garnishee. The judgment, thus affirmed, not having decreed the garnishees to pay over to plaintiff the property attached in their hands, plaintiff took a rule in the court below, on Chittenden and Bailey, the garnishees, to show cause why judgment should not be rendered against them separately, for an amount sufficient to satisfy his, plaintiff's, judgment, or why Bailey should not deliver to the plaintiff the money, bills of exchange, notes, &c., which he had acknowledged to hold as agent of the assignees of defendants. On this rule, the judge below decreed Bailey to deliver to plaintiff all the notes and credits he held as agent of the intervenors, or their proceeds, together with certain sums he had collected, the whole amounting to four thousand six hundred and three dollars and seventy-six cents. Chittenden was ordered to pay plaintiff the sum of two thousand five hundred and eighty-six dollars and seven cents, &c. After an unsuccessful effort to obtain a new trial, the garnishees took this appeal.

Although they both appear before us in the same capacity, yet their position is different in relation to their liability. It will, therefore, be proper to notice separately the relief they seek to obtain.

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A garnishee has no right, as such, to plead for any of the parties litigating for the property in his hands. He is viewed as a stake-holder, whose duty it is to declare the truth, and if his declaration be controverted, to support it, and prevent any improper decision to his prejudice.

Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation.

Bailey was not indebted to defendants. He had answered that he held some property as agent of Perkins & Putnam, the assignees of the defendants. His principals intervened in this suit, and their rights were finally adjudicated upon, in this court. Notwithstanding this, Bailey now attempts to revive, for their benefit, pretensions which have already been repudiated. He contends, that he having had notice of the assignment to the intervenors before he was made a garnishee, the property in his hands was validly transferred, and not subject to the plaintiff's attachment. Whatever may be our opinion in relation to this position, as supported by the evidence in the first record before us, we cannot listen to Bailey. A garnishee has no right, as such, to plead for any of the parties litigating for the property in his hands. He must be viewed in the light of a stake-holder. All he has to do in court, is to tell the truth, and if his declaration be controverted, to support it, and prevent any improper decision being made to his prejudice. If any such decision is made, he has no doubt the right of bringing it up for our revision, but he cannot be permitted to call our attention to errors which, if they exist at all, affect the rights of the other parties, and in no way concern him; still less can he do this, when, as in the present case, there is *res judicata* as to those rights.

Chittenden, the other garnishee, had answered, that he owed defendants five hundred and fourteen dollars and fifty-six cents, on an open account, and that, in consideration of goods sold to him by defendants, he had given them four notes in a negotiable form, payable at different periods, but that he did not know in whose possession these notes were. It is clear, that an attachment in the hands of the maker of a negotiable instrument, cannot affect a *bona fide* holder. We have but a few days since determined, that, by pursuing this course, a creditor cannot be considered as having attached any thing belonging to his debtor. We think, then, that, so far as Chittenden is concerned, there is error in the judgment under review.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, as against Bailey,

and be so amended in relation to Chittenden, as to decree him to pay only five hundred and fourteen dollars and fifty-six cents, amount due on open account, and that plaintiff and appellee pay the costs of this appeal.

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VS.
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OF VICKSBURG.

OAKLEY ET AL VS. COMMERCIAL AND RAIL ROAD BANK OF
VICKSBURG.

APPEAL FROM A FINAL JUDGMENT OF THE COMMERCIAL COURT OF
NEW-ORLEANS.

Where a corporation existing in another state is sued by attachment here, it is sufficient for such defendants to present a petition in compliance with the 12th section of the Judiciary Act of 1789, and allege that the corporators are all and each of them, citizens of other states, or aliens, in order to have the cause removed to the United States Court.

In an application for the removal of a cause to the United States Court, the State Court has no authority to inquire into the truth of the allegations in the petition. It is sufficient, and the record must show that the defendants are citizens of another state, or aliens.

This suit was instituted in the first District Court, and before final judgment, removed to the Commercial Court.

The plaintiffs allege, that they hold eleven hundred dollars in notes of the Commercial and Rail Road Bank of Vicksburg, a corporation established by a law of Mississippi, and domiciled in that state; and that said bank refuses to pay them in lawful money of the United States; wherefore, they pray for judgment and writ of attachment against the property of the bank in this state.

The defendant, on entering appearance, averred, that the plaintiffs were citizens of this state, and that they, viz: "The president, directors and company of the Commercial and Rail Road Bank of Vicksburg, are all and each of them, citizens of other states of the United States, or aliens," and pray for

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removal of the suit to the Circuit Court of the United States for the ninth circuit, holden in New-Orleans, &c., and they annex a bond with surety, and the usual affidavit.

On this issue, the district judge, before whose court the case was still pending, decided that a corporation is incapable of citizenship and cannot make the necessary allegations and showing, to entitle it to a removal of the cause to the United States Court. The application for removal was rejected; and the cause was soon after transferred to the Commercial Court; and, from final judgment rendered against the defendants, they appealed.

L. C. Duncan, for the plaintiffs, insisted that this case did not come within the jurisdiction of the federal courts, and that the application for a removal was properly rejected: and cited *Conkling's Treatise on the Jurisdiction and Practice of the United States Courts*, pages 234-5; 2 *Sumner's Reports*, 338; and the authorities there cited. 1 *Peters*, 238; 3 *Dallas*, 382; 6 *Peters*, 450.

2. The character of the party must be distinctly averred, and the particular state he lives in, and of which he is a citizen, must be stated; or the foreign country to which he belongs, if an alien.

3. It is not denied that the federal court has jurisdiction in cases where corporations are parties; but the point is this, that there must be such a distinct averment setting forth the state of which the party is a citizen. Now, though the state court is not called upon to decide the general question of jurisdiction of the federal court; yet, the state judge is as much bound by the act of congress, as the federal judge, and he must inquire whether there is such a case presented to him in the petition for removal, as will give clear jurisdiction to the federal court.

4. Tested by this principle, the petition for removal contains no such averment of citizenship and residence, as will enable the party to traverse that question. It should have been averred of what particular state, each stockholder is a citizen, or of what foreign country, a subject.

Hoffman, for the appellants, contended, that the averments in the petition for the removal of this cause to the United States Circuit Court, were fully sufficient, and showed that the defendants were non-residents, or citizens of another, or other states than this; or that they were aliens. In either case they are entitled to be heard in the United States Court. See 12th section of *Judiciary Act*, 1789. The authorities cited by the plaintiffs' counsel have no application to this case, and do not bear on it, or go against it.

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Martin, J., delivered the opinion of the court :

The only question which arrests our attention in the present case, is whether the judge of the inferior court erred in disregarding the defendant's petition at the time of entering his appearance, and on a tender of sufficient security, to have the case transferred to the Circuit Court of the United States, on an allegation that all the plaintiffs were citizens of this state, and that the defendants, to wit, "the president, directors and company of the Commercial and Rail Road Bank of Vicksburg, are all and each of them, citizens of other states, or aliens."

It is not contended that the security offered was not good and sufficient; and the defendants and appellants, therefore, urge that it was the duty of the court, in the language of the 12th section of the *Judiciary Act* of the United States, passed in 1789, to accept the surety, "and proceed no further in the cause."

The court had no authority to inquire into the truth of the allegations in the petition. This was the province of the Court of the United States after the removal. The judge of the inferior court, however, assumes that the defendants, being a corporation, could not be citizens of another state, or aliens; and that, therefore, they did not possess such a national character. The cases referred to by the judge *quo*, and the counsel for the plaintiffs and appellees, are as follows: *Bingham vs. Cabot et al*, 3 *Dallas*, 382; *Breithaupt vs. Bank of Georgia*, 1 *Peters*, 238; *Smith vs. Rines et al*, 2 *Sumner's Reports*, 338; and *Conkling's Treatise*, &c., 234-5.

Where a corporation existing in another state is sued by attachment here, it is sufficient for such defendants to present a petition in compliance with the 12th section of the judiciary act of 1789, and allege that the corporations are all and each of them citizens of other states, or aliens, in order to have the cause removed to the United States Court.

In an application for the removal of a cause to the U.S. Court, the State Court has no authority to inquire into the truth of the allegations in the petition. It is sufficient, and the record must show, that the defendants are citizens of another state, or aliens.

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The first case cited from 3 *Dallas*, 382, is one amongst others which was stricken from the docket of the Supreme Court of the United States, for not stating in their pleadings, that the parties were citizens of different states, or aliens. The next case relied on, was that of a corporation, and it was dismissed; the record not showing the citizenship, or alienage, of its members. The third case decides only, that a suit cannot be removed *partially*; that all the defendants must join in the petition for the removal. The last authority referred to, to wit, *Conkling's Treatise*, does not support the proposition in favor of which it is invoked. The case of *Breithaupt vs. Bank of Georgia*, 1 *Peters*, 238, oppugns it; for the affirmative, that a case is to be dismissed because the citizenship, or alienage, of the corporators is not alleged, is pregnant with the negative that a case like the present, in which such citizenship, or alienage, are set forth, and specially alleged, ought not to be dismissed for want of jurisdiction by a court of the United States.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court, be annulled, avoided and reversed; and the case remanded, with directions to the court below to accept good and sufficient security, and proceed no further in the cause. The plaintiffs and appellees, paying costs in both courts.

MEYERS ET AL. VS. GUESNARD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT,
JUDGE BUCHANAN PRESIDING.

Where the *presumptions*, arising from the whole evidence, which leaves the case doubtful, preponderate in favor of the defendant, and the district judge, who tried the case, gives judgment in his favor, it will not be disturbed.

So, where a vessel was apparently abandoned by the surviving partner, and taken into possession by the original owner, who paid the charges on her, and held the notes of the purchasers for half the price, but had offered to rescind the sale, and the question of acceding to this offer left doubtful: *Held*, that after the lapse of ten months, the purchaser will not be allowed to recover her back.

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This is an action by the surviving part owner of a schooner, called the "*Pomona*," who sues in his own behalf, and as curator of the estate of one William Facundus, deceased, the other partner, to recover said vessel from the defendant.

The plaintiff alleges, that they had purchased this schooner from the defendant, in October, 1835, for twelve hundred dollars, and that they continued to navigate her, and trade to New-Orleans, until January, 1837, when Facundus, who was in command, died; that they had paid one-half of the purchase money previous to his death, and since then, the defendant has taken possession of said vessel without any right or authority, and claims to be owner. He alleges, that when the defendant took said vessel, she was engaged in a very profitable trade. He prays that she be delivered up to him, and the defendant condemned to pay three hundred and fifty dollars per month for the use of her, &c.

The defendant denies any liability; admits the sale, price, and payment of one-half the price, by the plaintiff, but denies that Facundus was interested in the purchase. He avers, that the plaintiff was unable to make the last payment, and proposed to retrocede the vessel for the balance due, the defendant paying some charges and debts, to which he reluctantly agreed, as the vessel was in very bad condition. He denies that the plaintiff ever offered to pay the balance due, for which he is now willing to return the vessel, and on being reimbursed the sums he has paid for and on account of her, amounting to one hundred and forty-five dollars.

There was a mass of testimony taken and offered, under the issue made up, but which went principally to an apparent abandonment of the vessel by the plaintiff, and also to show there had been an agreement to rescind the sale, and retrocede the vessel on the return of the plaintiff's notes, &c.

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The evidence was various, and established nothing definitely which is not admitted in the pleadings.

The district judge concluded, that the plaintiff had, in fact, abandoned the vessel before the defendant took her, and had shown no right to recover. There was judgment for the defendant, and the plaintiff appealed.

Hoffman, for the plaintiff, insisted that there was no legal evidence of the offer to retrocede the vessel for the balance due on her, being only sworn to by one witness, which was not sufficient; that the whole testimony preponderated to the side of the plaintiff, and entitled him to recover.

Roselius, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff, in his own right, and as curator of the succession of his former partner, alleges, that in 1835, they purchased of the defendant a schooner, called the "*Pomona*," for twelve hundred dollars, on certain terms of credit, and that they continued to navigate the same in the coasting trade, until some time in January, 1837, when his partner, *Facundus*, died, at which time one-half of the price had been paid; that the defendant, at that time, without right or authority, took possession of the schooner, and claims to be the owner of her, and has refused to deliver her, notwithstanding his tender to pay the balance due of the purchase money. He prays that the defendant may be condemned to restore the schooner, or to pay her value, together with damages, for the use and detention of the same.

The defendant admits that he sold the schooner to the plaintiff, but not to him and *Facundus*, as alleged; and that two of the notes given for the price, remain in his possession, unpaid. He alleges, that the plaintiff afterwards agreed to retrocede to him the said schooner, in discharge of the last notes, amounting to six hundred dollars together; one hundred and forty-five dollars and seventy-eight cents, which he had paid on account of the vessel. He denies that the plaintiff ever offered to pay him the balance of the

price, and he offers again, in his answer, to give up the schooner, on the payment of six hundred dollars, together with the amount due for advances.

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It is not clearly shown, whether Meyers alone, or Meyers and Facundus, made the purchase, although it appears that she was navigated for their joint account, and commanded by Facundus up to the time of his death. The production of the notes yet remaining in the hands of the defendant, would probably have shown who was the real owner. It is for Meyers to prove that the schooner belonged to the firm by purchase. It is certainly proved, that on the death of Facundus, the schooner remained a considerable time abandoned in the basin; that the defendant took charge of her, without any pretension as owner, but rather as *negotiorum gestor*. One witness testifies, positively, that the captain of the port came to the defendant, while the schooner was in a state of abandonment, and inquired what was to be done with her, and the defendant replied, that she did not belong to him. He further states, that some time afterwards, Meyers came to the defendant, Guesnard, and asked him to take the schooner back for what he owed, as he had no money to pay his notes. Guesnard told him to sign an act of abandonment, and he would do so. Meyers said he would. The act was drawn up, but plaintiff went away, and never signed it. The witness further states, that about ten months afterwards, the plaintiff came to Guesnard, and asked him to give back the schooner. The latter reminded him that he had abandoned her to him. A discussion then arose between them, and Guesnard asked him why he put it off so long—why he did not come before, and claim the vessel?

The District Court concluded, from this evidence, that the defendant had made good his defence, and gave judgment against the plaintiff, who thereupon appealed. His counsel has insisted strenuously, that the statement of this single witness is not corroborated by any circumstances, and is consequently insufficient under article 2257, of the Louisiana

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Code, which requires, in cases of this kind, "at least one credible witness, and other corroborating circumstances."

It is clear, that at first, after the death of Facundus, the defendant disclaimed any title to the schooner; that a guardian was appointed by the captain of the port; that afterwards, Guesnard paid the fees of the guardian, and other charges on the vessel, instead of suing for the balance due him, and that about ten months elapsed before the second demand was made, and that, in the mean time, Guesnard was in possession, the reputed owner. Nearly a year had elapsed before the institution of this suit. Most of these circumstances are entirely consistent with the testimony of the witness, who swears to the retrocession; and the conduct of both parties seems to us to confirm the statement of the witness. If Guesnard intended wrongfully to take justice into his own hands, and convert the schooner to his own use, without the consent of the plaintiff, why did he not do so at first? Why did he pay the charges on the vessel? And, especially, why did the plaintiff so long desist from setting up a claim, when he knew that the defendant was in possession of the schooner? On the other hand, it may be said, that the circumstance of Meyer's leaving his notes in the hands of Guesnard, is inconsistent with the hypothesis of a rescission of the sale; that he would naturally have withdrawn them. Such a presumption may be fairly said to be counterbalanced by the fact, that the holder of the notes neither put them in circulation, nor attempted to coerce their payment.

Upon the whole, we conclude, that although the case remains somewhat doubtful, yet the preponderance appears to be in favor of the defendant, and as the District Court pronounced in his favor, we do not feel authorized to reverse the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE PARISH OF EAST BATON ROUGE, JUDGE JOHNSON, THE JUDGE OF THE DISTRICT, PRESIDING.

A party cannot be allowed to appeal from a judgment confessed by him, or in which he has acquiesced, by executing it voluntarily : Neither can he have such judgment amended on the appeal of the adverse party.

Where a vendor and mortgagee goes before a notary, and makes a declaration of release of his mortgage, on certain conditions, it cannot have the force of a contract, without the assent of the mortgagor, although the stipulation is in his favor. But the declaror is bound to carry into effect the intention expressed, whenever the other party signifies his readiness to accept the terms offered, if they have not been retracted.

An injunction case, when the answer is in, may be set for trial, pending a rule to show cause why the injunction should not be dissolved, and on the day fixed for the trial of the rule.

If, in an answer to an opposition obtained against an order of seizure and sale, the party sets up matter different from that in his original petition, or which amounts to a replication, it may be disregarded.

The record is the best evidence to show that certain persons were parties to particular proceedings had in the Probate Court, and is admissible.

On the 20th of May, 1839, the plaintiff obtained an order of seizure and sale, against a plantation, known as the "Arlington Place," for the payment of a note of the defendant for eleven thousand dollars, given in part for the price. The act of sale on which this order was granted, contained the usual clause of mortgage. The plaintiff, Williams, had previously purchased this estate at the probate sale of the succession of F. A. Browder, together with sixty-three slaves, and all the agricultural implements and improvements thereon. On the 20th of July, 1835, he sold and conveyed the Arlington estate, with all the slaves, &c., to Robert Duer, for the sum of one hundred and fifty-four thousand dollars, of which twenty thousand dollars were paid in cash, and the balance in ten instalments, for which the purchaser gave his notes, bearing ten per cent. interest ; the vendor retaining his

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mortgage until complete payment. He shortly afterwards released his mortgage on ten of the slaves. The second note for eleven thousand dollars, became due in April, 1839, and was protested for non-payment, and upon which the present proceedings were commenced.

The defendant made opposition to the order of seizure and sale, and obtained an injunction on the following grounds: 1. That several mortgages existed on said Arlington estate, against F. A. Browder, deceased, which were not declared at the time of sale. 2. A conventional mortgage in favor of Wilkins & Linton. 3. That Williams and wife had entered into a contract by which they bound themselves to release the remainder of the slaves from the original mortgage, on the condition that each of the said negroes be sold for a price equal to their purchase, and that the money arising from the sale of said slaves, either in whole or in part, should be applied to the payment of the notes and the liquidation of the debt contracted for the said Arlington estate. That he tendered to Messrs. J. and E. F. Phillips, the constituted agents or attorneys in fact of J. C. Williams, nine hundred dollars, as the value of one of the slaves, and demanded that they receive it on behalf of their principal, and release the mortgage, which they refused, alleging that Williams had revoked their power of attorney.

The defendant alleges, that said order of seizure is oppressive and injurious to his rights, and, for these and other causes, he prays that he be permitted to make opposition, and have an injunction staying all further proceedings on said order of seizure, until the said Williams shall cause all of said mortgages to be cancelled and released, and comply with his stipulations and contracts in the premises; and, that the plaintiff be required to give security against any disturbance of title or possession.

Upon these issues the cause was tried, and evidence offered to sustain the allegations in the opposition and injunction.

The other questions of law which arose on the trial, and stated in the several bills of exception, are fully set forth in the opinion of the court.

There was judgment dissolving the injunction, but requiring the plaintiff to give security ; and that he recover from the defendant the sum of eleven thousand dollars, with costs and interest ; and that the mortgaged premises be seized and sold for cash, for so much as will pay the present judgment, and on credit to meet and correspond with the remaining instalments of the price to *become due*. The plaintiff executed an indemnity bond to the defendant, and, notwithstanding, the latter appealed.

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A. N. and R. N. Ogden, for the plaintiff, prayed that the judgment so far as it required the plaintiff to give bond and security, be amended. They insisted that in this respect the judgment was prejudicial to their client.

2. That a further amendment be made so as to allow the plaintiff the damages he claimed in his answer to the opposition and injunction. The injunction was wrongfully obtained, and damages should be allowed on its dissolution.

Morgan and Elam, for the defendants, urged various grounds for the reversal of the judgment.

Bullard, J., delivered the opinion of the court :

The plaintiff, Williams, having procured an order of seizure and sale, was arrested in his progress, by an opposition and injunction on the following grounds : 1st, that the purchaser of the plantation and slaves was exposed to the risk of being disturbed by an outstanding mortgage in favor of the Bank of Louisiana, whose existence was not declared at the time of the contract, and against which the plaintiff, his vendor, is bound to warrant. 2d. That another mortgage on the same property still exists, to the amount of thirty-five thousand dollars, in favor of Wilkins & Linton ; and, thirdly, that the original contract between the parties was afterwards essentially changed and consolidated by a contract, by which it was agreed that Williams would release the mortgage on the slaves, so as to enable the defendant to sell a part, or the whole of them, to meet the payments due to his vendor, and which agreement he had violated.

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The District Court being of opinion that there was not sufficient evidence of the extinguishment of the mortgage in favor of the bank, directed that the plaintiff should give security against that incumbrance, and decided that the mortgage in favor of Wilkins & Linton, was extinguished by the probate sale, and that the subsequent contract in relation to the release of the slaves from mortgage had no effect upon the rights of the parties. The plaintiff acquiesced in the condition upon which this right to execute the judgment of the court depended, by giving security as required; and the defendant took the present appeal. In answer to the appeal, the appellee claims the reversal of the judgment so far as it condemns him to give the bond of indemnity, and its affirmance in other respects.

If the only question before the court had been whether the appellee was bound to furnish a bond of indemnity, and he had acquiesced in a judgment against him by giving the bond, it appears to us clear, that he could not have been permitted a direct appeal under article 567, of the Code of Practice, which provides, "that a party against whom a judgment has been rendered, cannot appeal, if such judgment have been confessed by him, or if he have acquiesced in the same by executing it voluntarily." How is the case varied, when that question is combined with others, all of which are solved in his favor except that, and when instead of a direct appeal, he seeks, indirectly by a proceeding authorized by the code and tantamount to a cross-appeal, to rid himself of a condition in which he acquiesced, and from which he could not escape by such direct appeal? We think the appellee ought not to be permitted to seek by a circuitous proceeding, a relief which the law forbids him directly.

Under this view of the case it is useless to inquire whether the Bank of Louisiana still retains a mortgage on the property in question; and, whether the court erred in admitting or rejecting evidence upon that point. We think it equally clear, that the mortgage given by Browder, to Wilkins & Linton, was extinguished by the sale made by the syndics. The only remaining questions, therefore, relate to the effect

A party cannot be allowed to appeal from a judgment confessed by him, or in which he has acquiesced, by executing it voluntarily: neither can he have such judgment amended on the appeal of the adverse party.

which is to be given to the subsequent contract between the parties, and those of practice which arose in the progress of the cause, and which are brought to our notice by sundry bills of exception.

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The act in question consists of a declaration before a notary on the 29th June, 1836, by Williams and wife, the vendors, that, whereas, Dr. Robert Duer had mortgaged to them, sixty-three slaves, to secure the payment of the price of the Arlington estate; and, whereas, ten of said slaves have been already released from said mortgage; now, they declare that it is their wish and intention that the balance of the slaves be released from mortgage, either in the whole or in part, and either by these appearers, or in their absence by I. & E. F. Phillips, (who are by these presents duly authorized thereto) upon the condition that each of said negroes be sold for a price equal to their purchase from Dr. Williams, and further, that the money for the sale of said slaves is to be applied to the liquidation of the notes given for the purchase of the Arlington estate. This declaration is not signed by Dr. Duer; and, therefore, although proposing an important derogation from the strict rights of the mortgagee in favor of the mortgagor, yet cannot be said to have, without the assent of Dr. Duer, the force of a contract *invito beneficium non datur*. But it is contended, that such assent was subsequently given before any notice of an intention on the part of Dr. Williams, to retract. In fact, it appears, that on the 8th of April, 1839, Dr. Duer addressed a note to I. & E. F. Phillips, the persons mentioned in the above act, informing them that in order to realize the sum due and to meet the payment of the installment, he tenders to them nine hundred dollars, the value of one of the slaves, and requests them to release the mortgage, in order that he may effect a sale of her free from incumbrance; and, it further appears, that the offer to pay was made through a notary public, who presented the above note to the Messrs. Phillips, and demanded a release of the slave Sukey. One of those gentlemen replied that they could not release the said slave from mortgage in consequence of the power of attorney for that purpose, having been verbally revoked

Where a vendor and mortgagee goes before a notary, and makes a declaration of release of his mortgage on certain conditions, it cannot have the force of a contract without the assent of the mortgagor, although the stipulation is in his favor. But the declaration is bound to carry into effect the intention expressed, whenever the other party signifies his readiness to accept the terms offered, if they have not been retracted.

EASTERN DIST. by Dr. Williams; whereupon the notary made a solemn
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We are of opinion that the Phillips were merely agents, and that Williams had a right to revoke their authority or procuration; but that he remained bound, notwithstanding such revocation, to carry into effect the intention expressed in the act, whenever Dr. Duer signified his readiness to accept of the terms offered, and that the latter might well have made the tender to Williams, after he was informed that the power of attorney to the Phillips, had been revoked. Indeed, it is not easy to give a good reason for saying that he is not now under obligations to give effect to his offer, upon the tender being made to him according to the conditions therein expressed. But while that agreement afforded to the defendant important facilities in making payment, and modified *protanto*, the conditions of the original contract, yet it does not follow that it operated a novation, as contended by the appellant, or even that it changed the place of payment as stipulated originally between the parties, as has been argued by his counsel. The rights it conferred were *in facultate solutionis*, and if the defendant had made his tender of the price of one of the slaves to the plaintiff, personally, after discovering that he had revoked the powers originally given to the Phillips, we should have considered it our duty to give effect to the agreement so far as concerns the price of one of the slaves. But that proceeding cannot affect the decision of this case, because the party has not been put in delay.

We proceed to notice those points of practice which are presented by the bills of exception in the record.

The first instructs us, that after the plaintiff, Williams, had filed his answer to the opposition and injunction, to wit, on the 13th of June, and, among other things set forth in his answer, prayed the court for a rule on the defendant, Duer, to show cause on the 21st of June, why the injunction should not be dissolved, which rule was granted; and on the same day, the said Williams moved that the said suits should be fixed for trial on the same day, to wit, June 21st. To this

fixing the cause for trial, the counsel of Duer objected, on the grounds: 1st. Because the case could not be set down for trial pending a rule to show cause why the injunction should not be dissolved. 2d. Because, by the answer to the opposition and injunction, the proceeding had been changed from the *executiva* to the *ordinaria*, and ought to be proceeded in as ordinary suits, and the same not having been served more than ten days before the first day of the term, the plaintiff in injunction cannot be ruled into trial at the present term. But the court have overruled these objections and assigned the case for trial, the defendant took his bill of exceptions.

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The court, in our opinion, did not err. The summary proceeding was not necessarily converted into the ordinary by answering the opposition, and even if it had been, it would not follow that the case could not be assigned for trial during the term, because more than ten days from the service had not elapsed before the first day of the term. We have twice ruled otherwise within a few days. Nothing prevented the party from obtaining a further delay, if necessary for his defence. Nor was the fixing the case for trial, in our opinion, incompatible with the rule to show cause why the injunction should not be dissolved. The proceeding is authorized by article 741, of the Code of Practice, which gives the plaintiff a right to compel the defendant to prove in a summary manner the truth of the facts alleged. In the case of *Forsyth vs. Lacoste*, 2 *Louisiana Reports*, 321, the court held that the proper mode of proceeding was by serving a rule to show cause why the injunction should not be dissolved. The trial of such a rule would necessarily involve the whole merits of the opposition, and would be essentially a trial upon the merits. There are cases, undoubtedly, in which no evidence is to be admitted, as when a motion is made to dissolve the injunction for want of equity on the face of the papers. But the case now before us is different. 5 *Louisiana Reports*, 52; 8 *Martin, N. S.* 561; 4 *Louisiana Reports*, 90 and 293.

The court did not, in our opinion, err, in refusing to direct certain parts of the plaintiff's answer to the opposition to be struck out. If the part objected to was contrary to the

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different from
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original petition, or amounted to a replication, it might well be disregarded without being stricken out; and, especially, was it proper to retain that part in which the plaintiff proffered to give security if required, to indemnify the defendant against certain incumbrances.

We learn by the next bill of exceptions, that on the day assigned for hearing the rule, the defendant, Duer, appeared by his counsel, and moved that it should be discharged on the following grounds. 1st. Because he could not be ruled to trial on the merits, or on the issues joined, pending a rule to show cause why the injunction should not be dissolved. 2d. Because the proceeding having been converted from the executory to the ordinary, the cause ought to be heard and determined as in ordinary cases, and the same not having been served more than ten days before the first day of the term, the plaintiff in injunction cannot be ruled into trial. 3d. That the law relating to summary proceedings is not applicable to this case. These objections and motion were overruled and the trial ordered to proceed, and the defendant took his bill of exceptions.

On most of the points thus presented, we have already expressed our opinion. Upon the last point we concur with the district judge, and, in our opinion, whether the proceeding be considered of the ordinary character or summary, no good grounds were suggested for discharging the rule, or postponing the trial.

The plaintiff offered in evidence a copy of the proceedings had in the Court of Probates in the settlement of the estate of Browder, to show that Wilkins & Linton, as well as the Bank of Louisiana, made themselves parties. To which it was objected by the defendant that he was not a party, and that the record was inadmissible. It was admitted, and a bill of exceptions taken.

The record is
the best evidence
to show that cer-
tain persons
were parties to
particular pro-
ceedings had in
the Probate
Court, and is
admissible.

The question was, whether Wilkins & Linton were parties to the probate proceedings, and the highest possible evidence of that fact was the record itself, which was very properly admitted.

There are other bills of exceptions relating to the admission

of evidence touching the mortgage to the bank, which, we have already remarked, it is not necessary to notice.

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Upon the whole, we conclude that there is no error to the prejudice of the appellant.

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The judgment of the District Court is, therefore, affirmed, with costs.

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EAST BATON ROUGE, JUDGE JOHNSON, THE JUDGE OF THE
DISTRICT, PRESIDING.

The plaintiff, in obtaining an order of seizure and sale against the mortgaged premises, acquires a *lien* on the growing crop from the moment of notification of the order of seizure to the defendant; and he may obtain a writ of sequestration against the crop during the pendency of a suspensive appeal from the order of seizure and sale, and in the absence of any principal demand before the court, at the time of granting the sequestration.

A mortgaged creditor is entitled to a writ of sequestration against the mortgaged property, whenever he apprehends it will be removed out of the state, before he can have the benefit of his mortgage; and in such cases, a writ of sequestration can be granted in the absence of a principal demand, pending before the court granting it.

The plaintiff, in this case, obtained an order of seizure and sale against a plantation and slaves, known as the Arlington Place, the 20th May, 1839, for one instalment of the price. The present defendant made opposition, and obtained an injunction staying all proceedings on said order. At the June term of the District Court following, the injunction was dissolved, and the defendant took a suspensive appeal to the Supreme Court. On the 14th September following,

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and pending the appeal, the plaintiff applied for and obtained writs of sequestration and injunction, and had the crops growing on said plantation (part of which was gathered) sequestered, and the defendants enjoined from selling it, and on which the plaintiff claimed a privilege or lien for the payment of the price which remains unpaid.

The defendant opposed the sequestration on several grounds, but, more especially, that the writ illegally and wrongfully issued, there being no suit pending, in which said writ could legally issue.

Upon this issue, the district judge considered the case. He was of opinion, that as there was no suit pending before his court to recover any thing, no action of the court could be had in the matter; that the judgment in the suit appealed from, gave no lien on the crop, nor was any privilege or lien prayed for in the original suit. There was judgment, setting aside the writ of sequestration and injunction, and the plaintiff appealed.

R. N. and A. N. Ogden, for the plaintiff.

Morgan and Elam, for defendant.

Simon, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment of the District Court, dismissing and setting aside writs of sequestration and injunction, heretofore granted in his favor.

From the facts of the case, it appears that on the 20th of May, 1839, the plaintiff obtained from the district judge an order of seizure and sale of considerable property, consisting of a large plantation and a great number of slaves, by him sold to the defendant, and on which he had the vendor's mortgage and special privilege, to secure the price thereof; that on the 25th of the same month, (the writ having issued on the 22d) the order of seizure and sale was regularly notified to the defendant; and that on the 30th following, before the writ could legally be levied on the property mortgaged, the defendant obtained an injunction, staying all

proceedings, which injunction was served on the 3d of June. It appears further, that the merits of the injunction were tried before the District Court, on the first of July ensuing, and that a judgment was rendered in favor of the plaintiff, setting aside the injunction, and declaring the order of seizure and sale, executory, &c. &c. ; from which judgment the defendant took a suspensive appeal. The appeal bond is dated the 5th of July, 1839, and was given for the sum of eighteen thousand dollars, sufficient to cover the instalment due at the time of the issuing of the writ. It is also to be noticed, that at the time the order of seizure was granted, only one of the instalments had expired ; that eight other instalments, to a very large amount, were to become due afterwards, and that the property mortgaged, though to be seized and sold for the whole debt, was to be sold for cash only, to the amount actually due ; the balance to be paid according to the terms of credit granted by the original contract. A crop of cotton was then growing on the land subject to the mortgage.

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On the 24th of September, 1839, the plaintiff, fearing that the defendant would remove, or dispose, to his prejudice, of the said crop of cotton, which was about being gathered, and a part of which had been already gathered ; and, conceiving that he had a lien on said crop, applied to the District Court for writs of sequestration and injunction, which were granted ; and on a written motion, made by defendant's counsel, to dismiss and set aside said writs, the district judge was of opinion, that they had illegally issued, and accordingly rescinded and set aside the sequestration, and dissolved the injunction. From this judgment, the plaintiff appealed.

The plaintiff's object, as he alleges, is to protect his rights on the property ordered to be seized, and preserve them in the same situation in which they were at the time of the notification of the seizure ; and he avers, that having then a lien on the crop, resulting not only from the mortgage, but also from the said notification, the defendant cannot be allowed to deprive him of it, under the shield, and by the effect of his injunction, and of his suspensive appeal. He further contends, that a writ of sequestration is merely a conservatory

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and provisional proceeding, granted by law at any stage of a suit, to secure the exercise of legal rights previously existing, and that the District Court cannot refuse to order the preservation of the thing in dispute, in another suit, even though the principal suit be pending before the appellate court.

The defendant, on the other hand, urges, that the plaintiff had or has no lien on the crop sequestered ; that no such demand was made by plaintiff, in his petition for an order of seizure and sale ; that no such right was recognized by the judgment dissolving the first injunction, and that none such ever resulted from the mortgage, or from the simple notification of the order of seizure. He further avers, in his written motion, that the writs issued illegally, as there was then no suit pending on or in which said writs could legally issue.

From these issues, two principal questions are submitted to our consideration :

1. Did the plaintiff acquire a lien on the crop growing on the land subject to be seized and sold, by the mere effect of the notification of the seizure to the debtor ?

2. Could writs of sequestration and injunction properly issue, in the absence of the pendency of any principal demand before the court to whom the application was made ? and could said writs be granted, whilst the principal demand is pending before the Supreme Court ?

I. According to the provisions of our Code, article 3245, mortgage is defined to be "*a right granted to the creditor over the property of his debtor, for the security of his debt ; and gives him the power of having the property seized and sold, in default of payment.*" The conventional mortgage, once established on an immoveable, includes all the improvements which it may afterwards receive. Article 3278. Under the article 456, "*standing crops are likewise immoveable, and are considered as part of the land to which they are attached ;*" and by article 457, "*the fruits of an immoveable, produced since it was UNDER SEIZURE, are considered as making part thereof, and inure to the benefit of the person making the seizure.*" If

the property mortgaged is in the hands of a third possessor, *“the fruits of the property mortgaged are due by the third possessor, only from the time when the order of seizure was served on him,”* &c. From all these articles, it appears to us to result, that the object of the law has been to allow a lien in favor of the creditor, on the crop standing on the property mortgaged, from the time that, exercising his right of action and having obtained a judgment of an order of seizure, he has brought home to his debtor, by a regular notice, the fact of his being about proceeding to the seizure and sale of the property. Yet it is urged, however, that the *article 457*, only gives the lien when the property mortgaged is *under actual seizure*, and that, therefore, there must have been a levy of the writ issued, which fact does not exist in this case. Was the property mortgaged in the hands of a third possessor, there would be no doubt as to the right; *Article 3371*. And we are unable to perceive, why the principal debtor should be more favored by the law, when his own debt is to be satisfied, than an innocent third possessor, who, perhaps, at the time of his purchase, was unaware of the existence of the mortgage. It seems to us easy to reconcile the articles of our code, so as to place the principal debtor and the third possessor at least on an equal footing. The expressions of the *article 457*, are: *“The fruits produced since the property was under seizure,”* and as the interpretation which we are disposed to give to that article, appears to us to be more concordant with justice and equity, we understand its letter to mean, that the lien on the fruits is allowed by law, whenever the creditor, after due notification made to the debtor, has acted so far on his action of mortgage, as to put the property under the order of seizure of a court of justice, and under the control of the law. Should a contrary interpretation be adopted, it would deprive the creditor of one of his principal rights, and the object of the law would rarely be attained, as it would be easy and always convenient to a debtor in bad faith to obtain an injunction after notification of the seizure, and previous to its being levied, and thereby to reap and enjoy the fruits of the property mortgaged, to the prejudice

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of his creditor. This our laws cannot have permitted. The circumstance of the debtor's giving an injunction bond and a bond of appeal, does not appear to us to be a sufficient or satisfactory remedy ; because, they not only become a subject of new litigation, but, as in the present case, in which a part of the debt only was due, they cannot cover the losses or damages which the creditor may suffer, in case the naked property is insufficient to satisfy the whole debt ; and there are cases, particularly with regard to executory process, in which no bond is required for obtaining an injunction.

We are confirmed in our opinion, by several French commentators, who have written upon articles of the Napoleon Code, very similar to those of our code, and from which our laws on the subject of mortgage, are principally derived. *Troplong, Hypothèque, vol. 2, No. 404, says: "Les fruits pendant par racines sont immeubles. Ils sont donc frappés de l'hypothèque, tant qu'ils sont attachés au sol hypothéqué; mais aussitôt qu'ils sont récoltés, ils deviennent meubles et échappent à l'hypothèque. Ibid., page 30, and page 403, No. 551; Ibid., vol. 3, page 360, No. 777, establishes the principle, that the mortgage creditors have their mortgage or lien on the fruits, "le commandement à fin de saisie." See also, page 366; and at the page 368, No. 778, he says: "Si l'hypothèque se met en mouvement, ou arrive à des résultats différens. L'action hypothécaire immobilise les fruits, lorsqu'elle se dirige contre le tiers détenteur. Elle les immobilise également lorsqu'elle saisit entre les main du débiteur la chose hypothéquée. On doit donc décider que les fruits échus depuis denonciation de la saisie n'appartiennent plus à l'antichrèsiste et qu'ils viennent augmenter le gage hypothécaire. Car en principe général, c'est de ce moment que les fruits sont immobilisés, &c., &c., et les fruits font des lors partie du fonds et tombent sous le coup de l'hypothèque."* It is

The plaintiff, in obtaining an order of seizure and sale against the mortgaged premises, acquires a lien on the growing crop from the moment of notification of the order of

true, that, in this case, there is no prayer in the plaintiff's petition for an order of seizure, that the crop then growing, should be sold with the land ; but it appears to us to have been useless ; the crop was then very small, and being a part of the "*fonds hypothèque*," we see no reason to make a distinction between the crop and the land ; it cannot cer-

certainly be pretended that the sheriff, in carrying the order of seizure into effect, at the time the order of seizure was issued, could have sold the crop separate from the land. EASTERN DIST.
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We are, therefore, of opinion, that the plaintiff, by exercising his action of mortgage, and by notifying the defendant that the order of seizure and sale was in the hands of the sheriff, subject to be executed after the legal delay, acquired a lien on the whole crop growing on the land; and that the district judge erred in deciding differently.

II. Having thus disposed of the first question, and plaintiff's lien on the growing crop being recognized, our next inquiry is with regard to the remedy which he may legally have to secure the preservation of his right. In this case, a part of the crop had been gathered at the time that the sequestration issued, but this circumstance does not, in our opinion, lessen or impair the right of the plaintiff, as it only shows that he was in danger of losing the benefit of his lien. The lien claimed by plaintiff was acquired on the 25th of May previous, and no act of the defendant could deprive him of its effect, either in whole or in part.

The plaintiff resorted to the writs of sequestration and injunction, which are the remedies specially pointed out by law, whenever it becomes necessary to preserve property in dispute, during the pendency of an action: *Code of Practice, articles 269 and 303.* And it is contended, that in order to obtain such writs, there must be a principal demand pending before the court to whom the application is made, and that, in this case, there was no such original suit. It will be conceded, that a sequestration is not always an original process; that it is a mere provisional order, which may be had at any stage of a suit: 1 *Martin's Reports*, 79. And were we to agree with the judge *a quo*, it would result that this provisional and conservatory measure would be denied in cases in which it might be mostly wanted, and that a party, after having taken a suspensive appeal, would be at liberty to put the property in dispute out of the reach of the claimant. It has been urged, however, that the appeal bond would be answerable for the consequences, and that the

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seizure to the defendant; and he may obtain a writ of sequestration against the crop during the pendency of a suspensive appeal from the order of seizure and sale, and in the absence of any principal demand before the court at the time of granting the sequestration.

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A mortgage creditor is entitled to a writ of sequestration against the mortgaged property whenever he apprehends it will be removed out of the state before he can have the benefit of his mortgage; and, in such cases, a writ of sequestration can be granted in the absence of a principal demand, pending before the court granting it.

plaintiff's remedy would be on the bond, after the determination of the appeal; but there may be cases, in which, as we have said above, an appeal bond would be insufficient, and in this case, particularly, it would not certainly be adequate to the loss which might be sustained, because the appeal bond secures the amount of only one instalment, whilst the property mortgaged, was to be sold to satisfy the whole debt. We are not ready to decide that the original demand is so entirely and definitively out of the control and jurisdiction of the District Court; that the district judge could not grant any provisional and conservatory order, so as to secure the ultimate execution of the judgment to be rendered in the appellate court, whose mandate he is bound to obey, and whose definitive judgments he is specially charged by law, to carry into execution: *Code of Practice, article 915*. But, is it true, that, under our laws, a writ of sequestration cannot issue, in any case, unless there be a principal demand pending before the same court? On referring to the 6th paragraph of the article 275, of the *Code of Practice*, we find that "*a creditor by special mortgage shall have the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the state BEFORE HE CAN HAVE THE BENEFIT OF HIS MORTGAGE,*" &c. &c.; and by a law of the 7th of April, 1826, the right is extended to all sorts of liens or privileges on the property. This is certainly one instance in which a writ of sequestration can be granted in the absence of a principal demand, and in contemplation of an action of mortgage not yet brought, but intended to be brought. It is analogous to the present case, for, the plaintiff here, asks nothing more than the protection of the law, and the privilege of issuing a writ of sequestration, to prevent the removal of the property subject to his lien, before he can have the benefit of his mortgage. Under this view of the question, we think the district judge erred in rescinding and setting aside the writs of sequestration and injunction, which he had previously granted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the writs of sequestration and injunction, heretofore obtained in this case, be reinstated; and that this case be remanded to the District Court for further proceedings, the defendant and appellee paying costs in this court.

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UNION BANK vs. MORTEE ET AL.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

The maker of a note cannot complain that demand of payment was made, after the last day of grace.

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This is an action against the maker and endorser of two promissory notes.

The defendants excepted to the right of the bank to sue, having suspended specie payments, and thereby forfeited its charter. The exception was overruled.

There was a general denial pleaded. Several bills of exception were taken by the defendants, on the trial, which are fully noticed in the opinion of the court.

There was judgment against the maker, on both notes, and against the endorser on one. The defendants appealed.

Penn, for plaintiff.

Davidson and *Mortee*, contra.

Martin, J., delivered the opinion of the court.

The defendants, sued as maker and endorser of two promissory notes, are appellants from a judgment against

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Neither of the parties deny their signature. The first note was protested in due time, and notice was given to the endorser, personally, on the day of protest. The second note bears date the 25th November, 1837, payable six months after date, and was protested on the 29th of May following, being one day too late.

The maker has contended, that, as the note was payable at a particular place, and the demand not made there until after the expiration of the last day of grace, judgment ought not to have been given against him. He requested the judge to give this in charge to the jury, which, being refused, he took his bill of exceptions.

The defendant also opposed the protest being offered in evidence, because it was null and void, having been made too late. It was admitted by the court, and the defendant excepted.

It does not appear to us that the judge erred. According to the latest decisions, it is very doubtful whether the maker can complain, when he contests the debt on the ground, that the demand was not made at the place where it was payable. In the present case, the demand was made there, and the maker cannot complain that it was made after the last day of grace.

The judge *a quo* correctly admitted the protest in evidence, directing the jury to ascertain thereby whether the demand was made in due time, and that if not in time, it would be binding on the maker, but not on the endorser.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The Union Bank did not loose its capacity to sue and stand in judgment,
by the suspension of specie payments.

This is an action against the maker of two notes. The defendant excepted to the capacity and right of the bank to sue, having suspended specie payments, and thereby forfeited its charter. These exceptions were overruled, and from judgment against the defendant he appealed.

Penn, for plaintiff.

Mortee, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment against him, as maker of two promissory notes. He did not deny his signature, but took exceptions to the right of the bank to sue for having suspended specie payments, and thereby forfeited its charter. He propounded interrogatories to the plaintiff, to establish this fact, which were excepted to by the plaintiff's counsel, and the exceptions were sustained by the court. He has no claim on this court for relief on the merits.

The decision of this court, in the case of *Atchafalaya Bank vs. Dawson*, 13 Louisiana Reports, 497, renders it unnecessary to examine whether the exceptions of the plaintiff were correctly sustained or not.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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ROBINETT ET AL. VS. VERDUN'S VENDEES.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE
PARISH OF TERREBONNE, THE JUDGE THEREOF PRESIDING.

Children of color (from a white person) are not allowed to prove their paternal descent when they have not been legally acknowledged; but this may be shown by proof against them, by the adverse party, in order to annul a sale made to them as a disguised and simulated donation to incapable persons.

So, children of color (from a white person) unacknowledged, cannot inherit or receive by donation *inter vivos* or *mortis causa*, even one fourth of the ancestor's estate; and, if by a disguised sale or donation, an attempt is made to give them a greater amount of property than can be legally disposed of, it is not reducible to the disposable portion, but absolutely null.

Colored children of a white person, not acknowledged by him, are incapable of receiving any thing by inheritance or otherwise.

This is an action instituted by the heirs and legal representatives of Alexander Verdun, deceased, to cancel and annul sundry sales of tracts of land in the parish of Terrebonne, made by the said Verdun to Jean Baptiste Gregoire, and six or seven other colored persons, alleged to be his illegitimate bastard children.

The plaintiffs show, that they are the collateral and legal heirs of said Verdun, and allege that said sales are fraudulent and simulated, being made as disguised donations to illegitimate colored bastard children, and not acknowledged. They pray that these sales be cancelled, and that they be declared owners of the property by inheritance.

The defendants resisted the plaintiffs demand by a general denial; and denied specially that they were the illegitimate, or bastard children of Alexander Verdun, deceased, and that the plaintiffs could not be allowed to prove or offer evidence of this fact, and that said sales were valid in law; that the plaintiffs were without any cause of action, and are not the legal heirs of Alexander Verdun.

Upon these pleadings and issues the cause was tried.

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On the trial, the plaintiffs proved their heirship, and produced the several acts of sale from Alexander Verdun to the defendants. Evidence was then offered to prove that the defendants were the illegitimate bastard children of Verdun, to which their counsel objected as inadmissible; but it was received, and they took a bill of exceptions.

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The judge was requested to charge the jury, that if by the evidence the sales to the defendants consisted of more than the vendor was legally authorized to dispose of in their favor, that they were, nevertheless, not null; but that the value of the disposition should be reduced to the disposable portion. The court refused, and the defendants took a bill of exceptions.

The jury returned a verdict for the plaintiffs against all the defendants, except J. B. Gregoire; and found in his favor. The other defendants appealed.

Splane, for the plaintiffs and appellees, insisted that the judgment should stand. It was clear the defendants were not capable of receiving any disposition in their favor, either *inter vivos* or *mortis causa*: *Louisiana Code*, 1478; *Civil Code of 1808*, 212, article 17. 1 *Louisiana Reports*, 495.

Miles Taylor, for the defendants, contended,

1st. A donation made under the disguise of an onerous contract with the design to extend the liberality of the donor beyond what the law allows him to dispose of, is not null, but reducible to the disposable portion, and the charge of the court to the jury on the trial, that it was absolutely null, was erroneous: *Paillet*, note book 3, article 920, *Trahan vs. McManus*, 2 *Louisiana Reports*, 215. *Toullier*, l. 3, tit. 2, No. 172, 85, 176; *Toullier*, l. 3, tit. 3, *De C. No.* 164.

2d. An act cannot be attacked as simulated until it is shown that the simulation is hurtful to the rights of a third person; and a gratuitous disposition of property can only be reduced when it extends the disposable portion, and, as a necessary consequence, no judgment in relation to the one or the other can be given, until the person seeking to destroy

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the act, or reduce the disposition, has shown the amount of the donor's property at his decease: 3 *Toullier*, No. 161; 12 *Martin*, 70, 255; *Louisiana Code*, 1489, 1491, 1480, 1474, 1492; *Johnson vs. Davidson*, 6 *Martin*, 506.

3d. The proof of the descent of free illegitimate children of color from a white father, is prohibited by our law, and testimony was improperly admitted on the trial to prove it. *Napoleon Code*, 331, 334, 340, and note d.; *Paillet*, 341, 342, 203, 205, 757; 1 *Toullier*, No. 972, 976; *Paillet*, note d. No. 2, 340; note a. No. 2, 762; note d. No. 2, 3, 340; *Duranton*, volume 3, No. 205-6-7, 242, 233; volume 7, No. 238, 239; *Merlin's Reports*: tit. *Filiation*, volume 17, article 335, 342; 343, volume 18; *Louisiana Code*, 234, 898, 254, 212, 221, 222, 226, 256, 258, 220, 200, 912, 913.

4th. If the defendants are the illegitimate children of Alexander Verdun, they are capable of receiving by donation from him to the whole amount of his property: *Louisiana Code*, 1456, 1483, 1470, 1473, 1475, 221, 199, 200, 201, 202, 220, 254, 916, 917, 912, 913, 914, 916, 918, 921, 911, 915, and 917.

5th. A sale is not null because the vendee does not appear in the act and accept it, or because made to a minor. *Baudin vs. Roliff*, 1 *Martin*, N. S. 165; 11 *Martin*, 217; 3 *Toullier*, No. 196.

Simon, J., delivered the opinion of the court:

This is a suit instituted by the legal heirs of Alexander Verdun, against the defendants, who are free people of color, for the purpose of annulling certain acts of sale and recovering sundry tracts of land sold to defendants by the deceased, on the ground that said defendants are the illegitimate bastards of the deceased; that, therefore, they are incapable of receiving from him by donations *inter vivos* or *mortis causa*; and that the said acts of sale were passed with a view to cover disguised, simulated, and illegal donations, made under the form of onerous contracts.

The defendants pleaded the general issue, denied specially the heirship of the plaintiffs, and further averred, that the

plaintiffs could not be allowed to attempt to prove the facts by them alleged, and had no right of action under the allegations set forth in their petition.

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This case was submitted to a jury, who found a verdict for the plaintiffs against all the defendants but one, named Jean B. Gregoire, and after an unsuccessful attempt to obtain a new trial, the defendants appealed.

Our attention is first called to a bill of exceptions taken by the defendants to the opinion of the District Court, allowing the plaintiffs to prove by parole evidence, that the defendants, who are free people of color, are the illegitimate children of the deceased Alexander Verdun, a white person; and it is contended, that the descent of free illegitimate persons of color, from a white person, is prohibited by law.

This court decided, in substance, in the case of Jung et al. vs. Doriocourt et al, 4 *Louisiana Reports*, 177, on a question very similar to the present one, that although children of color (from a white person) are not allowed to prove their natural paternal descent, when they have not been legally acknowledged, it does not follow that their natural paternal filiation cannot be proved against them. "A contrary interpretation," says this court, "would lead to the absurd proposition, that although the plaintiffs, (who have not been duly acknowledged) cannot claim alimony from the heirs at law, they might get the whole estate." It is true that the case above referred to was decided under the old Civil Code, which, though containing provisions very much alike, the Louisiana Code does not declare in positive terms, (*article 221 of the new code*) that "no other proof of acknowledgment, (that prescribed by the article) shall be admitted in favor of children of color." The very expressions of this article in favor of, seem to show, in our opinion, that the intention of the legislature, by adding the proviso to the article of the old code, was to exclude the other proof of acknowledgment specially and only when it was offered in favor of children of color, and that, under the known principle of law, *inclusio unius est exclusio alterius*, if the proof is not to be admitted in favor of children of color, when they

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Children of color (from a white person) are not allowed to prove their paternal descent when they have not been legally acknowledged; but this may be shown by proof against them, by the adverse party, in order to annul a sale made to them, as a disguised and simulated donation, to incapable persons.

attempt to establish their natural paternal descent, it should be received against them in favor of third persons, particularly when in opposition to the true object of the law, it is pretended that the absence of a legal acknowledgment ought to afford them a greater advantage, and more extensive rights than if they had been duly acknowledged.

We have been referred to several very respectable French authorities, to show that in France, illegitimate children are often protected from their legal incapacities, and that they are allowed to resist, in certain cases, the introduction of evidence of their illegitimacy. Hence, it is contended, that the articles of our code on this subject, being mostly taken from the French Code, it is proper that we should consult and even follow the opinions of the French jurists and commentators. This court has always been disposed to show the greatest respect to foreign writers on law and jurisprudence, and to the decisions of their courts, whenever the principles and rules by them established were in accordance with the spirit of our laws and the object of our institutions; but, in a case like the present one, it will be conceded that we are to decide the question for ourselves, and it will not be amiss to remark again, in the language of this court in the case of *Jung vs. Doriocourt*, that "a part of the population of that state has been placed by law under certain disabilities and incapacities, from which it is not the province of courts of justice to relieve them; and that there are very important considerations which impose on our courts a stricter observance of the laws relative to illegitimate children, especially to those of color."

We think, therefore, that the District Court did not err in permitting the plaintiffs to prove that the defendants are the illegitimate children of the deceased.

The decision of this question leads us to another bill of exceptions taken to the opinion of the district judge, who refused, on being requested by defendants' counsel, to charge the jury that "if they were of opinion that the acts of sale made by Alexander Verdun to the defendants, were simulated and made with the design to give them a greater

amount of property than could be legally disposed of in their favor, that, in that case, they were not null, but reducible to the disposable portion." And, it is urged before us, that if the defendants are shown to be the illegitimate issue of Alexander Verdun, they are capable of receiving one fourth of his property: this appears to us to be a *non sequitur*, and we cannot agree with the defendants' counsel in this proposition; for, it does not certainly follow that because his clients have been proven to be the unacknowledged illegitimate children of color of the deceased, they should be allowed the rights and capacities of those that have been duly acknowledged. It is clear that under the articles of 1470 and 1473, of the Civil Code, the defendants could not set up a claim to any part of the succession of their natural father, without showing that they have been acknowledged by him in the only mode prescribed by law; and we are unable to perceive any reason why, in this case, they should be placed on an equal footing with duly acknowledged natural children of color. It appears to us, also, very clear, that the object of the law, *Louisiana Code, article 226*, is to exclude illegitimate colored children from any right in the estate of their white natural father, by whom they have not been duly acknowledged, and that they can only set up such right, when their father is a man of color.

We think that the district judge did not err, in refusing to charge the jury as prayed for by the appellants' counsel.

On the merits of the case, we are of opinion that, the laws that allow to natural colored children from a white father, the right of claiming alimony from his heirs, and even to receive a part of his inheritance in certain cases, by donations *inter vivos* and *mortis causa*, when they have been duly acknowledged; have denied them the capacity of receiving any thing from him, when they have not been acknowledged. Were it otherwise, the object of the law would be easily evaded, and it would suffice to avoid making a direct legal written acknowledgment, to give to that class of our population, not only equal, but more extensive rights and capacities than are allowed to our white citizens; for, although known to

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So, children of color (from a white person) unacknowledged, cannot inherit or receive by donation, *inter vivos* or *mortis causa*, even one-fourth of the ancestor's estate; and if, by a disguised sale or donation an attempt is made to give them a greater amount of property than can be legally disposed of, it is not reducible to the disposable portion, but absolutely null.

Colored children of a white person, not acknowledged by him, are incapable of receiving any thing by inheritance or otherwise.

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the world and openly declared as the illegitimate issue of a white man, they would be considered as strangers to the family in the legal sense of the word, and as such would become capable, to the whole extent of the law, of receiving from their white father, donations *inter vivos* and *mortis causa*, to the prejudice and even exclusion of his legal heirs. This our laws have never contemplated.

Under this view of the question, we think the district judge did not err in his charge to the jury; and, on a careful examination of the evidence adduced by the plaintiffs, we are of opinion that the jury came to a correct conclusion in annulling the sales and considering them as disguised and simulated donations, made to incapable persons.

That part of the verdict of the jury and of the judgment of the lower tribunal, relative to the sale made to Jean Baptiste Gregoire, standing unappealed from; and the plaintiffs not having in their answer prayed that it be amended, is consequently not revised or disturbed in this decision.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed, with costs.

Bullard, J., did not join in this decision, having been of counsel.

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APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF ASCENSION, THE JUDGE THEREOF PRESIDING.

Where there is a judgment of eviction decreeing the land to the plaintiff, and providing that she shall pay the defendant a certain sum for his improvements before she takes possession, but the judgment fixes no time, the defendant may have execution immediately for the sum accorded him.

This is an injunction case. The plaintiff's wife obtained a judgment of eviction against the defendant for a tract of land, which judgment awarded the defendant twelve hundred dollars as the value of his improvements, but it affixed no time for the payment of this money, except the plaintiff was bound to pay it before she could obtain a writ of possession for the land. She appealed from this judgment, in order to get rid of this part of it, but it was affirmed. *See 9 Louisiana Reports, 271.*

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Before any mandate was sent down, or the decision of this court was registered in the court below, and, as the plaintiffs contend, before the judgment was executory, the defendant issued his execution for the sum awarded him as the value of his improvements. The plaintiffs then obtained this injunction. The only question in the case turns upon the defendant's right to take out execution on a judgment which awards him a certain sum, and provides that the plaintiff shall pay it before taking possession of the land, but fixes no time or limits within which it shall be paid.

There was judgment perpetuating the injunction, and the defendant appealed.

Illsley and Nicholls, for the plaintiffs and appellees, insisted on the affirmance of the judgment.

Miles Taylor, for the appellant, contended :

1st. The appeal taken by the appellees from the judgment in favor of appellant, on which the execution enjoined in this case was issued, was not suspensive, because bond with security was not given for a sum exceeding one half the amount for which the judgment was given. *Code of Practice, 575, 578 and 624.*

2d. The decree made in the case of *E. A. Conway*, wife of *A. F. Rightor vs. Gabriel Winter*, by the lower court, and affirmed by this court, on appeal, contained two distinct judgments : One upon the action instituted by the plaintiff for the land, and one upon the demand in reconvention plead by defendant, which was in its nature as distinct as if

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a separate action had been instituted for it ; and the judgment in favor of appellant, contained in the decree, was absolute and unconditional, and his right to enforce it was not in any manner dependent on the plaintiff's acts, with regard to the possession of the land. *Code of Practice*, 377 ; *Louisiana Code*, 490, 496 ; *Daquin et al vs. Coiron*, 8 *Martin*, N. S. 608.

3d. One in whose favor a judgment has been given, in the event of an appeal by the other party in which he failed to give the security necessary to stop execution, can proceed to the execution without awaiting the decision of the appellate court, and, of course, without waiting until it was recorded in the records of the inferior court. *Code of Practice*, 624.

Morphy, J., delivered the opinion of the court :

A judgment was rendered between these parties in a petitory action, which, on an appeal to this tribunal, was affirmed in March term, 1836. See 9 *Louisiana Reports*, 271. That judgment had decreed to the wife of the plaintiff, the tract of land she claimed, and allowed the defendant twelve hundred dollars for his improvements as a possessor in good faith. It provided that no writ of possession was to issue until the plaintiff should pay to the defendant the said sum, or deposit it in the clerk's office for his benefit. The appeal taken by plaintiff from this judgment, not being a suspensive one, an execution was issued at the instance of the defendant, for the sum awarded to him for his improvements. This execution was enjoined by the plaintiff, who relies, in this court, on the following points :

I. That the appeal was yet pending, or, at least, that the decree of this court not having yet been recorded below, no proceeding could be had there for want of jurisdiction.

II. That this judgment was only in favor of plaintiff, and gave defendant no active right, but merely an exception to maintain himself in possession until he was paid for his improvements ; and, moreover, that it created no personal liability against plaintiff.

III. That the defendant had no right to issue an execution

against plaintiff until he had restored, or offered to restore to her the land. EASTERN DIST.
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These several points being somewhat connected, will be considered together. It appears to us, that the decree in the petitory suit contained two distinct judgments, one in favor of the plaintiff for her land ; and one in favor of defendant for the value of his improvements. No delay was fixed, no condition was attached to the execution of the latter. If the plaintiff was dissatisfied with this absolute judgment against her, she should have taken a suspensive appeal. It is difficult for us to consider this judgment as containing in favor of defendant only an exception, when it decrees to him, positively and unconditionally, a sum of twelve hundred dollars. It is true that for his protection the decree provides that the land is not to be taken from him until he be paid that sum ; but it does not follow that the plaintiff is authorized to withhold the amount awarded to defendant until she chooses to take possession of the land. It would be rendering the possessor a tenant at will for years, liable to be driven away at any moment it would suit the interest or convenience of the owner. If he be evicted by a judgment which the owner has provoked, he is as much entitled to receive the money decreed to him, as the owner may be to resume possession of his land. Of what avail to him would be the precarious tenure under which he would hold the land? Would he cultivate it without the certainty or hope of enjoying the fruits of his labor ? Surely not. We must, therefore, say, that this decree contains, in favor of the defendant, a substantive judgment, which he must have the right of enforcing according to law. No reason has been given for the assertion that this judgment creates no personal liability against the plaintiff, except the supposed hardship to her that in case she is unable to pay for the improvements, and the property does not sell for a sum sufficient to satisfy them, she would remain liable for the surplus and thus be ruined ; perhaps for having attempted to enforce her legal rights. No doubt, in cases where the claimant is poor and the improvements are considerable, this is likely to happen ; but then, it

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is the misfortune of the claimant that he is without means, or that the property is sacrificed. Relief must be sought elsewhere than at our hands. It would be desirable that in cases of eviction, the owner, even after judgment, should have the privilege of freeing himself from all liability under it, by surrendering his rights to the possessor when he is unable to comply with the judgment; we know, however, of no law giving any such right. But, it is said, that admitting this judgment to be executory in favor of the defendant, he had no right to issue an execution until he had restored, or offered to restore to the plaintiff her land. To this it is a sufficient answer to say, that the judgment expressly authorizes the defendant not to deliver the land until he is paid. The offer to deliver it would have been a vain and idle formality, because, under her judgment, the plaintiff always had it in her power to take the land without consulting defendant's wishes; her right to the land is absolute on her paying to defendant the sum awarded to him. If she fails or neglects to pay such sum, the defendant's right is equally absolute to enforce its payment in due course of law. The injunction ought, in our opinion, to have been dissolved, and it is our duty to pronounce such judgment as should have been rendered below; but the surety on the injunction bond not being before us, no judgment can be pronounced against him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and, proceeding to render such judgment as ought to have been given below, it is further ordered and decreed, that the injunction be dissolved, and that the defendant recover of the plaintiff, twenty per cent. as damages on the amount of the judgment. The execution of which was enjoined, and that plaintiff pay costs in both courts.

CRESAP vs. WINTER.

EASTERN DIST.
March, 1840.APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE
PARISH OF ASCENSION, THE JUDGE OF THE DISTRICT, PRESIDING.CRESAP
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The wages of an overseer are prescribed, after the lapse of three years, from the time the services are rendered, notwithstanding they may have been continuous from the commencement to the time of instituting suit. Where suit is for six years wages of an overseer, prescription bars so much as has not accrued within the last three years before bringing suit.

This is an action to recover six years wages, as an overseer.

The plaintiff instituted his suit the 2d January, 1838, and alleged, that he was employed by the defendant as an overseer, to superintend his plantation and slaves, the first of January, 1832, and had continued in his employ to this time, and performed his duties faithfully, and that his services were worth one thousand dollars per annum; that the defendant is indebted to him in the further sum of six hundred dollars for moss sold.

The plaintiff further shows, that the defendant refuses to settle with him, and pay the amount justly due. He, therefore, prays judgment for six years wages from the first January, 1832, until the first January, 1838, and for the value of his moss, amounting to six thousand six hundred dollars, and that he have a writ of provisional seizure for the last year's salary against the crop.

The defendant pleaded a general denial; admitted, however, the plaintiff had been in his employ, but was ignorant of the business of managing a plantation, or of an overseer; and that, in consequence of this, his crops were greatly inferior; so much so, that, on an average, they were not sufficient to pay the expenses of the plantation, and to his damage ten thousand dollars. He also sets up an account for moneys and other articles advanced to, and on account of the plaintiff, all of which he pleads in reconvention, and also prescription.

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The district judge, after hearing the evidence, adjusted the accounts between the parties, and gave judgment in favor of the plaintiff for five thousand five hundred and sixty-eight dollars, from which the defendant appealed.

Isley and Nicholls, for the plaintiff :

The plea of prescription, (a plea peculiarly odious in this case, unmitigated as it is by the least pretence of payment) cannot avail the defendant. The code, treating of the prescription of *one year*, declares, that in the cases to which *this prescription* attaches, continuity is *no bar* to prescription, and thereby it certainly affirms, *ex converso*, that, in all other cases, *it is a bar—mentio unus exclusio est alterius*. The inapplicability of the law declaring continuity *no bar* to cases like the present, has been consecrated by this court, in 4 Louisiana Reports, 128 ; 10 Louisiana Reports, 201.

Miles Taylor, for the defendant and appellant :

1. The plaintiff sets up a verbal contract, and has failed to prove one.
2. The value of plaintiff's services, rendered to the defendant as overseer, is not proved.
3. The claim of plaintiff, for services rendered to the defendant as his overseer, at any time previous to the three years immediately preceding the institution of his suit, is barred by the prescription of three years. *Louisiana Code*, 3499, 3500, 3503 ; 6 *Martin, N. S.*, 228 ; 5 *Louisiana Reports*, 15 ; 10 *Louisiana Reports*, 204.

Morphy, J., delivered the opinion of the court :

This is a suit to recover wages, as defendant's overseer, for the last six years. The petitioner claims, moreover, the proceeds of a certain quantity of moss, sold by the defendant for his account. Defendant answers, that he entrusted plaintiff with the management of his plantation, at the request of said plaintiff, who represented himself as qualified to act as an overseer, and as possessing experience and skill in the management of a sugar plantation ; that, instead of being

so qualified, the plaintiff was entirely ignorant of the business he undertook, or so intentionally mismanaged defendant's estate, that it yielded crops very inferior to what it was susceptible of producing, and hardly sufficient, on an average, to pay the expenses; that, in consequence thereof, defendant has suffered damages to the amount of ten thousand dollars, which he demands in reconvention, together with divers other claims set forth in his answer. He pleads also the prescription of three years, given by article 3503, of the Louisiana Code, against the claims of overseers.

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This plea presents the only question of law for our decision in the cause. It is urged by the plaintiff, that the continuity of his services, as overseer, presents an obstacle to the application of prescription; that the Louisiana Code, article 3500, in treating of the prescription of one year, declares, that in the cases to which this prescription attaches, continuity is no bar to prescription, thus affirming, says the counsel, the converse proposition, that, in all other cases, it is a bar. This reasoning is far from being conclusive. Arguments thus drawn *a contrario*, seldom have the weight attached to them. They are sometimes found to be of no value at all, when the reason of the particular law is inquired into, from which an inference is attempted to be deduced. That part of article 3500, referred to, is taken *verbatim* from the Napoleon Code; its framers found it expedient to provide in it that continuity of services should be no bar to prescription, in order to remove doubts which might otherwise have arisen, on account of the anterior jurisprudence of that country; until then, it had been held, that the right of action of all *menial servants* accrued only when they left the service of their masters. "*N'étant pas raisonnable*," says Legrand, "*qu'un serviteur demeurant encore au service de son maître entreprenne de lui faire une sommation*." Thus prescription began to run only when the services ceased to be rendered. If such be the origin and intendment of that provision of the Napoleon Code, which has found its way into our laws, it should seem that an inference quite the reverse of that contended for, should be drawn from article 3500, to wit: that continuity of services

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should, *a fortiori*, be no bar to prescription for the claims of a higher grade, embraced by article 3503, and for which a longer time is provided by law. Such, moreover, seems to have been the construction heretofore given to it by this court. 5 *Louisiana Reports*, 15; *Coote vs. Cotton*; 6 *Martin, N. S.*, 515; *Judice's Heirs vs. Brent*. As to the other claims set up against each other by these parties, we fully concur in the view taken of them by the judge below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that plaintiff recover of defendant two thousand five hundred and sixty-eight dollars and forty-nine and a half cents, with privilege upon the sequestered property for one thousand dollars, amount of wages for the last year, together with costs in the lower court; those of this appeal to be borne by the plaintiff and appellee.

DUNCAN'S SYNDICS VS. DUNCAN'S HEIRS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF
EAST BATON ROUGE.

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Compensation cannot take place between debts which a party owes an estate, under administration, and those which it owes him. He still retains his interest to make opposition as a creditor, although it may turn out ultimately that he is a debtor for a balance due the estate.

The syndics of the creditors of the estate of Wm. Duncan, deceased, filed their tableau of distribution, in which they placed the heirs of A. L. Duncan as debtors for the amount of two judgments, and interest, amounting to seven thousand one hundred and twenty-seven dollars and thirty-one cents, while they are credited by a judgment against the estate and

interest thereon, amounting to three thousand eight hundred and fourteen dollars and eighty-seven cents.

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The defendants, heirs and legal representatives of Abner L. Duncan, deceased, opposed the tableau of distribution on various grounds; and especially that they ought to be placed thereon as creditors for ten thousand dollars. They further oppose the allowance of claims to various other creditors as injurious to them, and deny that the estate of Wm. Duncan is in any manner indebted for these claims. For these and other reasons, they pray that the tableau and petition for its homologation be rejected and dismissed.

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There was an agreement between the parties, that the heirs of A. L. Duncan should not be compelled to pay until it should be ascertained, upon a final judgment homologating the tableau, what amount is due them from the estate of Wm. Duncan.

From the mass of evidence which was produced, the judge of probates was still of opinion, the opponents failed to prove the matters set up in their opposition, and especially against the claims of the other creditors objected to. There was judgment, dismissing the oppositions, and the opponents appealed.

This court affirmed the judgment below, because it appeared the appellants stand on the tableau as debtors in a much larger sum than they are credited with; so that they are debtors for a balance, and without interest to contest the claims of the creditors.

A re-hearing was prayed for, and obtained, on the ground that the claim or debts for and against the appellants, placed on the tableau, could not be compensated and opposed so as to extinguish each other.

Brunet, for the plaintiff and appellees, contended that the tableau was properly homologated; that the judgment debts against the appellants were final, and formed *res judicata* between all the parties, and could not be changed; that there was no evidence to sustain any part of the opposition, and it could be viewed in no other light than an effort,

EASTERN DIST. continued through some sixteen years, to get rid of the
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sale of Wm. Duncan's estate.

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C. M. and F. D. Conrad, for the appellants, insisted, that the claims which they opposed were unsupported by evidence, and should be rejected.

Bullard, J., delivered the opinion of the court :

A re-hearing was granted in this case, on the suggestion that the court was mistaken in point of fact, in supposing that the appellants were not creditors of the insolvent. Upon looking again into the record, we find that William Duncan whose estate is administered by syndics, was indebted, at his death, to A. L. Duncan, and that the latter purchased largely at the sale of his effects. If compensation took place then, the latter would probably turn out to be debtor, instead of creditor, of the estate. But such could not be the case, and we are of opinion, that he retained all his rights as creditor, to make opposition to the tableau, notwithstanding the amount he owed to the estate as a purchaser, and notwithstanding any agreement that nothing was to be paid until the final settlement of the tableau. But we look in vain for the evidence in support of those claims to which the appellants made opposition in the court below, and justice, in our opinion, requires that the case should be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed, and that the case be remanded for further proceedings, according to law, the appellees paying costs of this appeal.

MUNICIPALITY NUMBER TWO VS. HENNEN.

EASTERN DIST.
March, 1840.APPEAL FROM THE COURT OF THE FIRST DISTRICT, JUDGE
BUCHANAN, PRESIDING.MUNICIPALITY
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The remedy given to the owner of property to prosecute the *folle enchère*, or purchaser failing to comply with his bid, is commulative. He may elect to prosecute the purchaser for a specific compliance with the terms of sale, or for damages, or he may proceed to a re-sale, at the risk of the first purchaser.

The vendor, in prosecuting the *folle enchère*, cannot recover the difference between the first and last sale, if he bids in his own property.

So the legal owner, or mandatory of the owner, who is alone interested in a sale at auction, is equally incompetent to purchase property at such sale; and so far as the *folle enchère* is concerned, the sale is null and void.

This is an action to recover the sum of forty-one thousand five hundred dollars from the defendant, as the difference between the first and second sales of certain property bid in by him, and re-sold at his risk, for the alleged refusal to comply with the condition of the first sale.

The record shows, that on the 29th August, 1836, the Second Municipality entered into an agreement with the Messrs. Frerets, and Messrs. Debuys, and others, for the purchase of a square and a half of ground, on which their cotton presses then stood, on certain conditions, the most material of which were, that the property should be divided out into small lots, and sold at public auction. The municipality guarantied to the vendors, that the property should bring at least three hundred and seventy-five thousand dollars, and the municipality entitled to receive whatever amount was over. The sellers guarantied and made the titles to the purchasers, and received in payment endorsed notes, at one, two, three, four and five years, with six per cent. interest per annum, and secured by a special mortgage on the property.

This property was put up at auction the first of February, 1837, after having been duly advertised, with the terms

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and conditions of sale, as "the property of the Second Municipality." At this sale, D. N. Hennen, the defendant, bid off seven lots, for the aggregate sum of ninety-two thousand five hundred dollars. The plaintiffs allege, that the defendant failed and refused to comply with the terms and conditions of sale, although the titles to the lots in question were tendered to him. On the 1st February, 1838, the property purchased by Hennen was sold by order of the municipality, at the risk of Hennen, when T. W. Collens became the purchaser of part thereof, and the municipality of the balance. On the 9th May following, that purchased by Collens was re-sold at his and Hennen's risk, and bought in by the Second Municipality. The difference between the price bid by Hennen at the first sale, in February, 1837, and the price at which the property was bid in by the municipality at the last sales, made at his risk, is forty-one thousand five hundred dollars, for which this suit is brought, and for which judgment is prayed against the defendant. The defendant admits the first sale to him, as the highest bidder, for ninety-two thousand five hundred dollars, but denies that the plaintiffs were the vendors, or could legally own said property; that they have no cause of action, and none exists against him; but avers, that if any claim can arise out of the sale of February, 1837, against him, or cause of action, the same vests in and belongs to those who were the owners of said property, and who were to give title to the same. He further avers, that he did offer to the owners to comply, in every respect, with the terms of said sale, and require of them a title in conformity therewith, but that they refused to comply with said adjudication; that so far from being put in default or delay by the plaintiffs for failing to comply, he did all in his power, or that the law could require, to carry said contract into effect.

The defendant further avers, that from the refusal and neglect of said parties to carry said contract into effect, he considered it at an end, and that he has now the right to have it rescinded and annulled; that the plaintiffs can, in no event, have any claim against him for damages, inasmuch

as they, or the owners of said property, failed to put him in default by offering to make a legal title thereto; and, by not fulfilling any of the requisites of the law, he denies that the property was legally sold at his risk and cost. On the contrary, he avers, there are manifest errors and illegalities in all the proceedings had to effect said pretended sale at his risk. He prays, that the original sale and adjudication be declared illegal and cancelled, and that the plaintiffs' demand for damages be rejected.

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Upon these issues, the cause was tried before a jury.

The plaintiffs produced, in evidence, the agreement between them, and the Frerets and Messrs. Debuys and others, for the sale and purchase of the ground and cotton presses mentioned, and also the advertisements, terms and conditions of the sale of February 1, 1837. They also showed, that the acts of sale were drawn up by their notary for the defendant to sign. Mr. Freret, who was to make the titles, attended the notary's office at the hour indicated, and the defendant failed to appear, having been there before the hour fixed, or designated by himself. Notice that the acts were prepared for his signature, was then given *in writing by the notary*, the 17th September following the sale. The defendant declined accepting or signing the acts of sale. Evidence of the re-sale, by the municipality, at Hennen's risk, and the *purchase*, at said sale, by the municipality, at half the original price, was given. The defendant offered no evidence.

Upon the evidence and pleadings, after hearing the arguments of counsel, the jury returned a verdict for the plaintiffs, and, after an unsuccessful effort to obtain a new trial, from judgment, confirming the verdict, the defendant appealed.

Carter and Benjamin, for the plaintiffs:

1. On this statement of facts the first question that presents itself is this: What was the nature of the contract between Frerets and the municipality? We are not aware that there is any reason why this contract should be called

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by any particular name, nor classed in any particular category ; legislative foresight has not gone so far as to provide particular classes within which must necessarily be embraced all contracts to which the endless variety of human affairs can give rise. We must, therefore, be content to remain subject to the sarcastic remarks of the defendant's counsel, and humbly confess that this is a contract of which we have been able to find no counterpart in any books that we have consulted ; that it is *sui generis*.

That it possesses many features of a sale is most undoubted ; that thereby an equitable interest in this property became vested in the municipality, and a right to control its disposal to a certain extent is equally clear ; but that they were the purchasers of the property in the full sense of the word we do not admit, because it was expressly stipulated that no title was ever to become vested in them ; that the property was to be sold by the Frerets at public auction, and titles passed by them to the purchasers at public auction ; and that the Frerets, and not the municipality were to receive the price of the public sale. True, if this price exceeded a certain amount, the surplus was to be paid by them to the municipality : Why ? As a consideration for the guarantee of the municipality, that the price should not fall short of this fixed limit. Who were to pay the price to Frerets ? Not the municipality, but the purchasers at the public auction. The municipality were to have nothing to do with passing the title ; and it was expressly agreed that they were to be subject to no guarantee ; but inasmuch as the gain or loss resulting from the sales exceeding a certain limit, or falling short of it, was to fall on them, they were invested with the control of the sale.

2. Defendant contends : 1st. That the property has not been legally alienated ; and on this point he relies on the 11th section of the act of 17th February, 1821, requiring the assent of two-thirds of the city council to an alienation of real estate ; the law does not state, as defendant's brief would seem to imply, "that this fact must appear affirmatively by their records, and cannot be presumed." This latter

clause is a mere inference of defendant, or an exposition of what he understands to be the correct principle on this subject. On this point it might, perhaps, be sufficient to observe that the law quoted is inapplicable to the present case; that this is not the case of a municipal body attempting to alienate the public property; but an agreement with individuals that they shall break up an establishment pronounced to be a public nuisance, and sell out the property in lots, so as to promote the improvement of that part of the city where these establishments were situated. This case is so clearly out of the whole scope and spirit of the enactment, which is a safe-guard, thrown by the legislature around the real estate owned by the municipality, to prevent ill-advised and doubtful measures tending to the too easy squandering of its resources, that a simple statement of the facts of this case would seem to afford an ample refutation of this ground of defence. But the interests of the municipality and of others to an immense amount are involved in the decision of this question, and its importance must form our excuse for going more into detail, than would be required merely for the purposes of the present controversy.

The records of the proceedings of the council, at repeated sessions, have been offered in evidence, and through a long series of deliberations it is shown by those records, that the sale of the property in question was ordered and ratified by resolutions stated to be passed; the records stating also that all the members were present. These records are signed by the Recorder. It is contended that this is not sufficient, because the ayes and nays were not recorded, or, in other words, that this court must presume, contrary to the statement on the records, that these resolutions were not passed; for, if it required a vote of two-thirds to pass them, and that number did not vote affirmatively, they were not passed, but rejected. We contend that the presumption of law is, that the proceedings of public officers are regular till the contrary appears; that a party impeaching the regularity assumes the burden of proving the irregularity, which is an affirmative susceptible of proof; that the records are conclusive evidence

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that these resolutions were passed ; or, if not, at all events such *prima facie* evidence as to throw on the defendant the burden of proof, that four members voted against them, this number being necessary to defeat them in a council composed of ten members.

On this point we cite "*Angell & Ames on Corporations*," 128 to 158, and the authorities there cited. *Adams vs. his Creditors*, ante 454.

3. The defendant denies having been legally put in default. The whole of his argument on this point is based on a mistake. His statement of facts is incorrect. He omits to notice his own letters of 25th April and 5th July, 1837. In these letters, it is explicitly avowed by him that he had been requested to comply with the terms of sale. The whole doctrine of putting in default is one purely technical, having no bearing on the real merits of a controversy ; and was so considered by this court, when it reluctantly adjudicated the case of *Erwin vs. Fenwick*, 6 *N. S.*, 230, in favor of defendant. Our law does not require any particular form for that purpose, 3 *Louisiana Reports*, 385 ; and a party may, by changing a passive into an active breach of contract, waive the necessity for putting him in default ; as in the case of *Kelly vs. Caldwell*, 4 *Louisiana Reports*, 40, where the party, called in to comply with his contract, answered, that "he considered it at an end." So, in the present case, Hennen having agreed to furnish the endorsement of Lea and Penn, and having procured that of the former, deposited the notes with the notary, that they might be endorsed by Penn and delivered to his vendors ; but unable to procure Penn's endorsement, he, as shown by his letter of 5th July, withdrew the notes from the notary, and thus actively violated his contract, which active violation rendered a putting in default unnecessary ; but the whole correspondence and evidence of Freret, J. B. Marks and J. Marks, will satisfy the court that he was repeatedly required to comply with the terms of sale, and always refused. But we are told that the acts of sale were not signed by the municipality, nor was their warranty tendered. This is so mere a quibble, that we could not

believe it would be seriously insisted on in this court. By the public advertisements, the purchasers were notified that they were to receive their titles and their guaranty from Frerets. Defendant contends that this meant from Frerets and the municipality. It would not be going too far to hazard the assertion, that not an individual in the city of New-Orleans, who read the advertisement, was deceived as to its meaning; that no one person who bid at the sale expected a deed to be offered by the municipality, or that the defendant himself ever dreamed of such a demand till his counsel found it out for him in this suit. The words of the advertisement are such as to exclude such an idea, if taken as the code requires, in their usual sense, without attending so much to grammatical rules, as to general and popular use: *Civil Code*, 1941. But if defendant was entitled to the warranty of the municipality, by the terms of the auction sale, he had a tender of it; for, by the acts offered to him, signed by Freret and others, at page 59, it is stated, that the property is conveyed to him by virtue of the adjudication at auction, and in conformity with it; so that, if this adjudication entitled him to the warranty which he now requires, he received it.

It is proper to observe, that, when called on to comply with the terms of sale, Hennen did not require any warranty from the municipality; that he expressed no dissatisfaction with the deed tendered; that he merely, by his letter to Freret, stated that he wanted some information about the title; and finally, that even by his very answer filed in the suit, he expressly disclaims to have contracted with the municipality; and yet is now contending that he did contract with them, and relied on their warranty. They are so palpably and absurdly inconsistent as to require no comment.

This court, by the decision in *Stewart vs. Paulding*, has decided that the tender of an act of sale was necessary to put a party in default in proceedings *à la folle enchère*; but it did not, and could not, sanction a doctrine so fraught with pernicious consequences, so favorable to parties in bad faith seeking to evade their obligations, as to decide that, if a bill of sale be tendered, and no objection made as to its sufficiency,

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the party to whom it is tendered can afterwards escape his responsibility by picking flaws and searching for irregularities till then unnoticed.

The case of a legal tender is perfectly analogous. Such tender can only be made in gold or silver; yet it is well settled, that if payment be offered in bank notes, and no objection be made at the time, the legality of the tender cannot afterwards be disputed.

4. We next arrive at the third ground of defence, viz: That the property was not re-sold in strict compliance with the terms of article 2589, of Civil Code, that it is a forced alienation of property, and that all the forms of law must be strictly pursued.

If necessary in this cause, we think it would not be difficult to show that defendant is mistaken in the opinion that the proceeding technically known as the *folle enchère* is a forced alienation of the property of the bidder at the first sale. True it is, that by article 2586, the adjudication is the completion of the sale, and vests title in the highest bidder; but this is conditionally, on the event of his complying with the terms of sale, for if he fail, article 2589 considers the sale to him as null, "as if the first adjudication had never been made." The vendor re-sells his property, not that of the bidder in default, and the difference in price between the two sales is a simple measure of damages, conclusive between the parties, because made in such a way as to offer a fair test of these damages. When, therefore, a vendor sues on the proceeding *à la folle enchère*, he does nothing more than claim damages which have become liquidated in a certain manner. This is the true nature of the *folle enchère*, and will be more fully developed in another portion of our argument.

Let us now see under our law, whether the formalities prescribed by article 2589 have been complied with: 1st. The property was advertised during ten days, and sold on the 11th. It was first advertised on the 22d January. It was sold on the 1st February. It was, therefore, advertised eleven days, counting the first and last, or ten days, excluding one of the extremes. On the 1st February, when the property

was sold, it had been advertised full ten days, viz : the ten last days of the month of January. In a ten days advertisement, three insertions suffice, but the advertisement was inserted nine times in one paper, and ten times in the other. See *Civil Code*, 1110.

We now come to the question as to the construction of that part of the article which authorizes a re-sale, at the end of ten days and after the customary notices. There is no doubt that the construction contended for by the defendant is correct so far as this, viz : that the word *and* being a copulative conjunction, is cumulative in its meaning, and that both a ten days delay and customary notices are required. Now, in all sound grammatical construction, where two members of a phrase are connected by the copulative conjunction, the order of the members may be reversed, and the meaning remains the same ; in this case, to arrive at the true meaning, let us reverse the order in which the members of the phrase are placed, and then the reading would be this "the seller after the customary notices and at the end of ten days may again expose for sale ;" or, in other words, if the bidder does not pay the price as required, if he is put in default, the vendor must make the usual advertisements and sell at the end of ten days ; the ten days are the term during which he is to advertise, the nature or kind of advertisement is directed to be the customary notices, *i. e.*, in towns where newspapers are printed, the notices must be through the public gazettes ; in parishes where no gazettes are printed, the notices must be such as are customary in those parishes. There is no article of the code directing *all sales* of immoveables when required by law to be advertised during thirty days. Wherever the law requires a thirty days notice it expressly says so, as in the different cases of forced sale suggested in defendant's brief ; the article of the code to which reference was no doubt made, was the article 1108 ; but this strengthens the construction we contend for, showing that what the legislature meant by usual or public notices, was notices posted up at the public places ; the word usual referring to the manner of advertising, not to the duration of advertisement.

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5. But we are told that the terms of the first sale were changed. How? That at the first sale, which took place on the 1st February, 1837, the property was sold at a credit of one, two, three, four and five years from that date; at the second sale, which took place on the 1st February, 1838, the property was sold at the same credit from the same date. The defendant says that we sold as "if the first adjudication had been made." Here again is sophistry, which a little examination will soon make evident. What is the meaning of the words "as if," &c.? Simply this, that the fact of the first adjudication, which, by article 2586, vests title, shall not prevent a re-sale, if the purchaser fail to comply, but that this re-sale shall take place "as if," &c.; but on what terms? Clearly as at the first sale. What were the terms of the first sale? Equal instalments, payable on the 1st February, 1838-9-40-1-2. These were precisely the terms of the second sale. True, at the date of the second sale one term had already become due; but this cannot change the construction of the law, which must be interpreted in the same way, whether the new sale took place a month or a year after the first. A question may, indeed, and does arise, whether we are guilty of *laches* in deferring the second sale a year; but this is another and different question. The construction we give is obviously the only just one. The vendor who exposes property for sale, specifies such terms of credit as his circumstances allow him to offer. He knows at what periods he will need the price, and fixes them. The bidder causes the property to be adjudicated to himself, and then fails to comply with his contract. Is it not clear that it could never have been the intention of the lawgiver that the vendor should be at the mercy of the faithless purchaser, who, by combining with others, might protract *ad infinitum* the term of payment, and defeat the disposal by the vendor of his own property on his own terms? An interpretation leading directly and inevitably to such a result as this, can never be sanctioned.

6. But we are accused of *laches*, of not having re-sold the property within a reasonable time. This is a question which

was not put at issue in the court below, and we had not prepared ourselves with testimony especially directed to this point. Fortunately, however, the evidence in the record, and facts of public notoriety, will convince this court that the jury were amply justified in negating this charge. The record shows that Hennen continued to amuse the plaintiffs with propositions for settlement and compliance with the terms of sale, till late in the summer of 1837. The purchase was made by him in February of that year. The commercial distress which still pervades our community commenced (and this is a fact of which the court will require no proof,) in the month of March, 1837, and increased in severity each successive day. On the 25th April, we find Hennen, by his letter, still professing a readiness to settle. We find him depositing notes, which, by agreement, were to be endorsed by M. G. Penn, in the notary's office, with the ostensible intention of completing the sale: And we afterwards find him, on the 5th July, actively violating his contract, by withdrawing the notes which his vendors were to have received. If, at this date, at a period when the danger of sickness drives from amongst us a large portion of our population, the municipality had pursued its *folle enchère*, no terms would have been found by defendant strong enough to reprobate the unwarrantable severity, as he terms it, of their proceeding. And because they did not insist on an immediate sale; because their indulgence extended to him a delay of a year; because a period was selected, in the midst of the winter, one deemed the most favorable for public sales; because a reluctance was shown by this corporation to resort to harsh measures before exhausting, without avail, all amicable means, we are told that we were guilty of *laches*, and lost our remedy. This was a question peculiarly subject to the cognizance and decision of a jury, and they thought that there was no *laches*, and this court will concur with them in opinion. The manner in which the plaintiffs' rights were asserted, was rather favorable to defendant than otherwise, although it could not be expected that he would be satisfied with our measures, however

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lenient, as any that we might adopt must necessarily have resulted in a heavy loss to him.

7. But the objections to our proceedings under this article are not yet exhausted. We are told that we had no right to buy in the property, that it was our own, that we cannot be vendor and vendee, that, consequently, there was no second adjudication, and, therefore, that our measure of damages, as provided by this article, no longer exists, and that the verdict of the jury, based on this measure, must fall, being unsupported by evidence, when this basis is withdrawn. In aid of this position, and of the incapacity of plaintiffs to bid at the sale, the cases of *Baham vs. Bach*, 13 Louisiana Reports, 287, and of *Scott's Executrix vs. Gorton's Executor*, 14 Louisiana Reports, 111—115, are relied on.

The former of these decisions is too obviously correct to be questioned by us. In the eloquent language cited by the judge who delivered that opinion, "the principles on which it is based are the noblest principles of morality and justice, principles calculated to preserve honesty between man and man." What, then, is the decision in the case of *Baham vs. Bach*? That the owner of a property offered for sale at public auction, has no right to bid at the sale, unless he publicly reserves to himself that right. Why? Because his conduct is such as to raise, in the minds of the bystanders, false impressions as to the real value of the property: because it is a fraudulent artifice, inducing them to make higher bids: because the seller thereby profits at the expense of the purchaser to the full amount of the enhanced bid elicited by this fraudulent artifice. Compare with this decision, and the reasons on which it is based, the situation of the vendor, who exposes property at the *folle enchère*; a proceeding, the true nature of which is merely, as we have already shown, the fixing a *measure of liquidated damages*, to be paid by the first purchaser, for his breach of contract. Does the vendor, by bidding at this second sale, and giving more for it than any one else, profit at the expense of the purchaser, or does he not, on the contrary assist him in diminishing the measure of damages? If this were a question between third persons,

who came to bid at the sale, and the municipality, they might with some appearance of justice, invoke, in their support, the decision of *Baham vs. Bach*, but when the defendant, in the *folle enchère*, complains that the vendors were the highest bidder, he complains that a lower bid was not taken, or, in other words, that the damages charged against him are not heavy enough. We conclude, that the case of *Baham vs. Bach*, in its principles and reasoning, is entirely inapplicable to that now before the court.

In the case of *Scott's executrix vs. Gorton's executor*, however, this court did decide that the vendor at the first sale could not bid at the *folle enchère*. That this cause was correctly decided we do not presume to question, as its circumstances were such as fully to bear out the court in its decision, independently of the point now under discussion; but we will respectfully suggest to the court some considerations, which induce us to believe that the opinion expressed, that plaintiff could not recover in that case, because the vendor had bid at the *folle enchère*, is not supported by law. The first fact to which we will advert in support of this position is, that the legislature in its provisions on this subject, anticipated the presence, at the *folle enchère*, of the parties to the first adjudication, and confines its prohibition against bidding "to the purchaser at the first sale and his agents." We shall be answered that this can only be, because in the nature of things, the vendor could not be the purchaser of his own property, and, therefore, no prohibition against bidding was necessary as to him. But the argument on this subject contains a sophism which must be exposed before we can arrive at a correct conclusion; this sophism is based on confounding the *highest bidder* at an auction sale with the *purchaser*. No law prohibits; and the decision in *Baham vs. Bach*, expressly recognizes the right of a party to bid at a public sale of his own property, provided he publicly reserves to himself that right; the vendor then may honestly and fairly have his own property stricken down to him as the highest bidder. Now, if the object of the *folle enchère* be, not to enforce a second alienation of the property, (for this was a matter of indifference to the lawgiver, and must

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be so to the purchaser,) but to fix the amount of damages, the whole reasoning which dictated the decision in *Baham vs. Bach*, as well as that in *Scott vs. Gorton*, is inapplicable, for the object of the second adjudication, viz: the ascertaining the highest value of the property at the re-sale is as well and fairly attained by the vendor's becoming the highest bidder as any other person.

8. The defendants have exhausted all their ingenuity to satisfy the court that this is a forced sale; that the auctioneer is a public officer, merely replacing the sheriff; and that the rules of law applicable to forced sales must govern. If this be so, our right to bid was very clear, for *article 688, Code of Practice*, provides, in express terms, that a debtor may himself bid for his property offered for sale under an execution, and so may the judgment creditor; and yet, if defendant's counsel be correct, this is an absurdity in the very nature of things, for a man's property cannot be sold to himself. No, but it may be adjudicated to him as highest bidder, and then the auction results not in a sale, but, as it were, in a kind of forced appraisement of the value, showing the extreme price that can be obtained for it.

But even if the court adhere to its decision, in the case of *Scott vs. Gorton*, the circumstances of this cause are such as present a necessary exception. True it is, that, by the agreement with the Frerets, equitable interest in this property was vested in the municipality; but that agreement expressly provided that the titles were to be transferred by them to the purchasers at the auction sale. Now, the title of the municipality to the property was not complete till an adjudication to them at auction, and the adjudication, far from being a sale of their own property to themselves, was necessary to perfect their title.

The argument on this head is based, on our part, on the assumption, that the *folle enchère*, in its nature, is not a forced alienation of the property of the bidder at the first sale, but a mere measure of damages. On this point, there is a consideration which strikes us as conclusive, drawn from the law itself. If this be a forced alienation of the property of the

first bidder, as contended for by plaintiffs, and not a means of liquidating damages as contended for by us, how is it possible that the legislature could ever have sanctioned the absurdity that, under such hypothesis, would be presented by the last clause of article 2589? "If a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess." What! authorize a forced alienation of a man's property and withhold from him the price after the sum due is paid? No; such is not the legislation on the subject. The whole context of these articles shows that our construction is correct; and, as this subject is now, for the first time, presented for decision, we confidently expect a decree sanctioning this construction.

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One word more as to this auction sale. Independently of the presumption of law, we have positive testimony on the record, as to the real damages. By article 1928, of Civil Code, the damages due to a creditor for a breach of contract, are the amount of the loss which he has sustained, and the profit of which he has been deprived. By the testimony of Mr. Peters and of Mr. Cenas, it is shown that Hennen bid no more at the first sale than the current market value of the property, and that if he had not been present, it would have been sold to other bidders for substantially the same price; and that, on the re-sales, the property brought its full value at the date of these re-sales. Can any comment on this testimony be necessary to show actual deprivation of profits suffered by the municipality through Hennen's default, to the full amount claimed in this suit?

9. We now come to the last position assumed by the defence, i. e., that the title to this property was in the Frerets, that they alone can be considered as the vendors, and as entitled to the remedy by the *folle enchère*, which it is contended is a personal right, inherent in them and not susceptible of alienation. That this objection is, at the best, one of mere form, more in the nature of a dilatory exception than a defence on the merits, is evident; its effect, if sustained, being merely to drive plaintiffs, to a fresh action to be instituted by the Frerets for their use; and if a dilatory exception,

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it cannot be sustained, because waived by the defendant going to trial on the merits without objection.

In examining the right of a party to institute a suit, or to claim a particular remedy, the first and most natural question which suggests itself is this: in whom is vested the interest which gives rise to the suit? If tried by this test, the municipality and not the Frerets are the real parties in interest. What is the nature of the present claim? A demand against defendant, that he shall make good the price of the first adjudication, by paying the deficiency resulting from the fact that the second sale produced a smaller sum. It is in reality a part of the price of the first adjudication which we claim. Now, by the terms of the agreement between the Frerets and the municipality, such part of the price of the first sale was to be paid to the latter, as might remain after the former had received a certain fixed amount; and by the testimony on file it is shown that the Frerets were paid in full out of other proceeds, leaving to the municipality the claim against Hennen for the total amount of the adjudication to him. Here, then, is a full and complete assignment by the Frerets to the municipality of the total amount due by Hennen, so that if the claim in question be in its nature assignable, we must recover.

Grymes and Eustis, for the defendant:

I. To enable the plaintiffs to recover in this action, they must establish:

1st. That the property was legally alienated by the plaintiffs.

2d. That the defendant, Hennen, has been legally put in default, according to article 1905 and 1907, of the code.

3d. That the property re-sold at his risk has been sold in strict compliance with the requisites and formalities of the law, necessary in such forced alienations of property.

4th. That they have a right of action, founded on a legal interest in the subject matter set forth in their petition, as the owners of the property purchased by Hennen on the 1st of February, 1837.

The answer of the defendant put the whole matters at issue.¹ EASTERN DIST.
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The defendant has introduced no evidence on the trial below, and relies confidently on the want of such a showing by plaintiffs as will enable them to recover in law.

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Following the foregoing propositions in their order, we propose to show, that the plaintiffs have failed to establish any of said propositions; and,

I. The property has not been legally alienated.

By the 11th section of the act of 17th February, 1821, two-thirds of the members composing the council are necessary to an alienation of real estate, which fact must appear affirmatively by their records, and cannot be presumed from the attendance of any number of members. *See City Laws, page 325.* We also refer to the senate journals of the United States, *passim*. Such, also, is the usage in the Municipality No. 2, for the ayes and nays are taken on the question of sale on the second of August, 1836, and two-thirds did not assent; yet the records of the council assert that the resolution has passed.

II. The defendant has not been legally put in default.

To establish the converse of this, the plaintiffs rely on the letter of the notary, addressed to the defendant, September 17, 1837, stating to him that the *acts of sale were ready for his signature.*

By the article 1905, of the code, a debtor is put in default by the *act of the party*, either by the commencement of a suit, demand in writing, verbal requisition in the presence of two witnesses, or by a protest by a notary public.

Article 1907, of the code, is as follows: "In *commutative* contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, *the party who wishes to put the other in default* must, at the time and place expressed in, or implied by the agreement, *offer or perform*, as the contract requires, that *which, on his part, was to be performed*, or the opposite party will not be legally put in default.

It is apparent that this letter, as a demand in writing, does

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It does not profess to be done for, and in behalf of either the municipality, or Freret, brothers, or the Debuys.

On the trial of the cause, the notary deposed that he wrote it at the request of the comptroller.

The comptroller is an agent of the municipality. It has not been shown how his powers can extend to such an act, nor whether a demand on him would be sufficient default against the municipality. Whatever doubts may exist on this point, there can be none on the position we assume, that the comptroller had no authority, by law, to delegate his authority to another. "*Delegata potestas non potest delegari*," is the maxim of the common law, and the maxim of the civil law is: *Procuratorem alium procuratorem facere non posse. Digest, lib. 14, tit. 1, l. 1, §5. Ibid., lib. 49, tit. 1, l. 4, §5.*

The default being, by our law, a pre-requisite to the recovery of damages, a pre-requisite for the dissolution of the contract, and for the exercise of that highly penal remedy given by article 2589, of the code, operating by a forced alienation, at once a dissolution of the contract, and as a measure of damages, can it be seriously pretended, that such a writing, emanating from an individual who has no character as agent of the parties by virtue of his office, professing to act for no one, can be called, in words of the article 1905, the act of the party? And let us ask here, for what party does it profess to act? Would a verbal requisition, in the presence of witnesses, made by a third person, in terms similar to the above, be deemed sufficient to carry, with all the legal consequences of a default?

But this letter, in the words of article 1907, does not contain an offer on the part of the creditor "to perform that, which, on his part, was to be performed." It announces, that the certain acts of sale had been drawn up by Mr. Marks, and that he demanded from Hennen to "comply with the terms of sale." Has he stated who the vendors are? or has he made either an offer, or tendered a title to the defendant? See the cases of *Wilbor vs. M'Gillicuddy*, 3 La. Rep. 385. *Stewart vs. Paulding*, 5 Idem., 154.

2. "The statement of facts in the present case, does not show that any act of sale, in writing, was passed, or offered to be passed, by the seller. The only testimony adduced on this subject, is that of the auctioneer, who testified that the defendant, when requested by him, refused to comply with the terms of the sale. But this was not sufficient to put him in default, according to the article 1907, of the code above cited, for the plaintiff did not offer to perform that, which, on his part, was to be performed, viz: to make the deed of conveyance."

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Such also, is the doctrine of the common law: "It seems to be a general rule, that the vendor of an estate cannot sue the vendee on the contract to purchase, unless he, the vendor, has not only shown or offered to show a good title, if bound so to do, but has executed the conveyance, or offered to execute it, or tendered it to the vendee; for the party seeking to enforce an agreement of this nature must clearly evince and notify a willingness to complete it on his part, before the other party can be considered in default. *Chitty on Contracts*, 245; *Jones vs. Barkley Doug.*, 634; *Phillips vs. Fielding*, 2 *Hen. Black.*, 123; *Hawkins vs. Kemp*, 3 *East*, 443; *Wilmot vs. Wilkinson*, 6 *B. and C.*, 506; *Sugden on Vendors*, 8 *ed.*, 230-235.

3. The publication, terms and conditions of the sale are made by the municipality, as owners of the property. They are the vendors and bound to perform all the obligations and formalities as such.

We are told that Messrs. Freret, brothers, are to give us a full guarantee of the title. We have assented to it; but we hold the municipality bound, as seller, to that warranty which the seller cannot escape, the warranty for the price paid, in case of eviction, even admitting that there is no other warranty.

Article 2479, of the code, says: "The parties may, by particular agreement, add to the obligation of warranty which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty."

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Article 2481: "Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction, and purchased at his peril and risk."

The municipality being the vendors, could they put the defendant legally in default until they had tendered him such an act of sale as he was entitled to—a deed divesting them of their title—setting forth to him and the world by whom the property was sold, and who was bound to restore the price in case of eviction, and who only was bound to the warranty, for the fruits, revenues, costs and damages?

If the object adjudged is an immoveable or slave, for which the law requires that the act of sale shall be passed in writing, the purchaser may retain the price, and the seller the possession of the thing, until the act be passed. Article 2588, of the code, found under the head of "Sales by Auction."

The same principle is laid down in the case of Long vs. French, 13 Louisiana Reports, page 260. This was a suit instituted "to compel the defendant to execute a conveyance of the property by authentic act, and to recover damages."

The evidence of the sale consisted in an agreement in writing, signed by the parties; the judgment of the inferior court, ordering the defendant to make an authentic act was affirmed. There are several other decisions to the same effect, and this is the usage in all cases of sales of immoveable property.

In the argument of the cause in the inferior court, the plaintiffs have been driven to a denial that the municipality purchased, or ever owned the property in dispute, in direct contradiction of the allegation, that they purchased, in their petition. They have maintained that the contract of August 29, 1836, was a contract of guarantee; a contract of agency; a compromise; a contract *sui generis*.

It is not conceived to be at all important to the merits of the present controversy, to settle this point, whether the municipality were the owners of the property sold to defendant on the 1st February, 1837. The obligations of the plaintiffs as vendors; the obligations and rights of the defendant

as purchaser, are not to be affected by any private agreements or contracts between Freret, brothers, and the plaintiffs; the true nature and character of the contract between the parties to this suit is to be found in the terms, conditions and announcements at the sale, to which alone, on the adjudication, the defendant has given (the essential part of a contract) his consent.

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Following the plaintiffs in their last position, that the municipality were not the owners of the property on the 1st February, 1837 :

If they sold the property of Freret, brothers, as a sale of another's property, it was a nullity, (*Civil Code, article 2427*) a nullity enacted for the benefit of the purchaser. Admitting, for the argument, that they were not the owners; that the title was vested in Freret, brothers, on the 1st February, 1837, the article 1833, of the Civil Code says : "No one can, by a contract in his own name, bind any one but himself or his representatives; but he may contract in his own name that another shall ratify or perform the stipulation which he makes, and in this case he shall be liable in damages if the contract be not ratified or performed by the person for whose act he stipulates."

This last article corresponds to the article 1120, of the Code Napoleon, the former to article 1599, of the same code.

The sale of another's property in the manner pointed out by the latter article, is considered by all the commentators on the code as valid and not embraced in the nullity enacted by article 2427. 1 *Troplong, Vente*, 380; 16 *Duranton, No.* 180; 10 *Ibid.*, No. 218.

The question then arises, is the seller of another's property bound to guarantee?

We contend that he is bound to the warranty.

What is the contract of sale? it is defined by our code, article 2414, perfect by the concurrence of three circumstances, a thing sold, a price, and the consent.

By article 2431 : "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller as soon as there exists an

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agreement for the object and for the price thereof, although the object has not yet been delivered, nor the payment made." *Merlin's Rept. de Jurisprudence, verbo Vente, section 1, article 1-3; Pothier, Vente, No. 7.*

4. We come now to the next and last inquiry, has the property sold at the defendant's risk been legally alienated?

We contend that the sales at the defendant's risk on the 1st February, 1838, and 9th May, 1838, were not made and conducted in pursuance of, and in compliance with the formalities of the law.

The article 2589, authorizing sale at the risk "*or folle enchère*" of the purchaser who fails to comply with the terms of sale, is as follows:

"In all cases of sales by auction, whether of moveables or of slaves or immoveables, if the person to whom adjudication is made does not pay the price at the time required, agreeably to the two preceding articles, the seller at the end of ten days, and after the customary notices, may again expose to sale the thing sold, as if the first adjudication had never been made; and if, at the second crying, the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication had been made, the latter remains a debtor to the vendor for the deficiency, and for all the expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess.

And we contend:

1. The sale, "*a la folle enchère*," is not a voluntary, but a forced sale; that the above article is to be strictly construed.

2. This sale can only be made by the seller. It is a right strictly personal; and if assignable, (supposing Frerets, as contended on argument, to be the sellers,) no such assignment to the municipality appears on the record.

3. That the sales have not been made on the same terms and conditions as at the original sale; that they have not been made "as if the first adjudication had never been made."

4. That the customary notices or advertisements have not been made.

Our code, under the head of "Sales at Auction," commencing with article 3579, speaks of the sale at auction as voluntary, when the owner himself offers his property for sale in this manner; forced, when the law prescribes this mode of sale for certain property, such as minors, &c. Article 2580.

On this sale "*a la folle enchère*," the original purchaser cannot bid directly or indirectly: Article 2590. He is bound for the loss by difference in the re-sale, and for the expenses, but can derive no possible benefit by the chance of a higher price.

By the adjudication, the sale was completed, and the purchaser became the owner of the property. Article 2586.

And yet, we are told by the plaintiff's counsel that this is not a forced sale; not a forced expropriation of the defendant's property. It is difficult to imagine in what manner it can be considered as a voluntary sale by the owner of his own property, when he must stand by at a sale, conducted by the seller, with a prohibition of law against his bidding directly or indirectly.

A more rigid penalty for the accidents or folly which may prevent a purchaser from fulfilling his contract, cannot be found under any system of laws.

5. If the defendant had been legally put in default, what remedies had the plaintiffs? 1st. To sue for a specific performance of the contract. 2d. To sue for its rescission. 3d. And in either case to sue for damages. 4th. The sale "*a folle enchère*."

A remedy at once operating a dissolution of the contract and establishing the measure of damages; not a tardy remedy, to be made effectual through the intervention of the courts, but a remedy summary, of a highly penal nature, in the hands of the creditor; he has made his election, and the defendant asks only from this court the little protection which the law has thrown around his rights and interests, in the strict and legal interpretation of this remedy.

Referring to article 2589, it is obvious that the remedy cannot be exercised until ten days after the party has been put in default. The ten days begin from the default; "at

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the end of ten days" refers to the words "time required," which precede. There is not a word said as yet about advertisements to which the word "end" can have reference. There are sound reasons in the law, that this extraordinary remedy should not be enforced until ten days have expired from the default. Then follows, "at the end of ten days and after the customary notices, &c. The word "and," here used, is cumulative in its meaning. It is not that the creditor may proceed, &c. "at the end of ten days or after the customary notices," the debtor is to be entitled to the delay of ten days, "and" (in addition to) the customary notices before the sale shall take place.

In the case now before the court, the record shows (see advertisements,) that the property was advertised on the 22d day of January, and sold on the 1st of February, 1838, being nine intervening days, Sunday included.

We understand by customary notices, in reference to sale of immoveables, the notice required by the Code of Practice during thirty days, for sales of immoveables in successions, sales under writs by sheriffs, sales of minors' property, &c. There is and can be no customary notices in sales of real estate by individuals, guided only in matter of notice by caprice or interest. This we conceive to be the only meaning that can give the law effect.

The sale "*a la folle enchère*" is one of the amendments of the old code, enacted in 1825. No such remedy was known under the old code, (see head "Sales at Auction," old code.) What was the meaning of the legislature when these amendments were adopted, speaking of customary notices? They could not have had a reference to notices customary in sales *a folle enchère*, which did not exist? They evidently meant the customary notices we contend for, to wit: in sales of successions, sales by syndics, and other forced sales.

The plaintiffs contend that the advertisement during ten days is sufficient; has the property been sold after ten days advertisement? No.

The advertisement appeared in the Bulletin on the 22d January, in the Bee on the same day; in the Bulletin it was published but nine times, including both days, in the Bee ten times, including both days. But the days of sale and the first day of advertisement are both to be excluded. *McDonough vs. Gravier's Curator*, 9 Louisiana Reports, page 545.

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"After thirty days cannot mean *within* that period, which would take place in the present instance if both the days of advertising and sale be included in the calculation of time."

En cas de vente par folle enchère le délai prescrit par l'article 739 C. Pro: entre l'apposition des placards et la première publication: doit être de 15 jours francs. Dalloz, 1828, 2d part, page 176.

The advertisement must be complete in two newspapers. *Laws of 1837, page 69.*

The sales of 1st February, 1838, and May 9, 1838, were not made on the same terms and conditions as the first sale, or, "as if the first adjudication had never been made."

At the original sale (1st February, 1837,) the terms were one, two, three, four and five years credit; on the re-sales of 1838, the property is sold at one, two, three, four and five years credit from the 1st February, 1837, making it, virtually, at one-fifth cash, and the balance at one, two, three and four years, a sale made "as if the first adjudication had been made," and not complied with.

As the words preceding "may again expose to public sale," authorize the sale, the words that follow, "as if," &c., refer to the manner, to the terms. It is not conceived that language could convey a meaning more clearly, or that a greater deviation from the law could have been made, than that in the present instance.

The vendor had his choice; to sue for specific performance; for a dissolution; and for damages; to commence the proceedings in a sale "*a la folle enchère*," after ten days, from default. The delay is justly chargeable to his own laches. They ought to have exercised the remedy within a reasonable time.

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Bullard, J., delivered the opinion of the court.

The facts which led to the present controversy, so far as it is necessary to recapitulate them, are substantially as follow: that in August, 1836, the Second Municipality entered into an agreement with the Messrs Frerets and others, the owners of certain cotton presses and the ground on which they were erected, within the limits of that corporation, that they (the proprietors) would sell to the municipality that property, which it is not necessary particularly to describe, on condition that the whole should be divided into lots and sold by the municipality on a long credit, payable in annual installments, with interest at six per cent. They were to receive three hundred and seventy-five thousand dollars, to be paid as will be hereafter mentioned. The municipality was to be put in possession as early as the 10th September, and within a time limited by the agreement, the plaintiffs were to cause the whole to be sold at public auction, for notes to be endorsed to the satisfaction of the vendors, together with collateral notes for accruing interest. The vendors agree to take the notes thus given in payment, the principal with the interest being considered as cash, and the municipality not to be responsible for their ultimate payment. It was agreed further, that should the proceeds of the sale be less than the aforesaid sum, then the deficiency was to be made up by the municipality. The vendors bound themselves to furnish the purchasers of the lots good and sufficient titles, it being understood that the municipality was not to warrant the titles to the purchasers.

Such is substantially the original agreement between the municipality and the proprietors of the ground, in pursuance of which the sale of the lots took place. The whole amount of sales was five hundred and seventy thousand seven hundred dollars, leaving a profit, after paying the price stipulated, of one hundred and ninety-five thousand seven hundred dollars in favor of the municipality, and it is shown that the original proprietors have been entirely satisfied, independently of the price of the lots now in controversy in this case.

At the sale by public auction, of the lots in question, the defendant became a purchaser for a large amount, and having

as is alleged, failed to comply with the conditions of the sale though legally put in default, they were exposed for sale at his risk, and the present action is brought to recover the difference between the first and second adjudication, to wit: forty-one thousand five hundred dollars. At the second sale, the municipality became the highest bidder and purchaser of the lots. We leave out of view an intermediate exposure of the property at which Collens became the nominal purchaser of a part of the lots.

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This proceeding took place in virtue of article 2589, of the code, which provides that in all cases of sales by auction, if the person to whom the first adjudication is made does not pay the price at the time required, &c., the seller at the end of ten days, and after the customary notices, may again expose to public sale the thing sold, as if the first adjudication had never been made; and if, at the second crying, the thing is adjudged for a smaller price, than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor for the deficiency, &c. It is further provided, that if the property should sell for a higher price, the first purchaser has no claim for the excess; and that the first purchaser is not permitted to bid either directly or through the intervention of a third person.

The answer of the defendant denies the ownership of the plaintiffs, and their right to maintain the present action. He denies having been put legally *in morâ* by offering to make him a legal title to the property, or by fulfilling any of the formalities of law. He denies that any of the property was legally sold at his risk, but avows on the contrary that there are manifest errors and irregularities. The defendant finally claims that the adjudication to him of the 1st of February, 1837, be cancelled and annulled.

There was a verdict and judgment in favor of the plaintiffs for the amount claimed in the petition, and the defendant appealed.

In this court the case has been argued with distinguished ability on both sides, and we have had all the aid which professional learning, or acumen could afford us. Little light is

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The remedy given to the owner of property to prosecute the *folle enchère*, or purchaser failing to comply with his bid, is cumulative. He may elect to prosecute the purchaser for a specific compliance with the terms of sale, or for damages, or he may proceed to a re-sale, at the risk of the first purchaser.

derived, it is true, from adjudicated cases under this provision of our code or that of France, which is somewhat analogous, although believed to be restricted to cases of forced sales by judicial authority; and we are left to put a construction upon this part of the code guided by those general principles which govern all contracts, and especially that of sale at public auction, and at the same time those principles which ought to prevail when resort is had to summary and extraordinary remedies.

It seems to be conceded on all hands, that the remedy given to the owner to prosecute the *folle enchère* is cumulative; that he may elect either to prosecute the purchaser for a specific compliance with the terms of the sale, or for damages by the ordinary action, or may proceed to a re-sale, at the risk of the first purchaser, under the restrictions provided by the code. Such re-sale, at which the first purchaser is not permitted to interfere either directly or indirectly, and which may never turn to his profit, fixes the measure of liquidated damages which the delinquent purchaser is bound to pay. The remedy, therefore, is certainly summary and severe, and ought to be confined to cases clearly coming within the provisions of the law, and in which all the previous conditions have been complied with, and the second sale conducted fairly and legally. It is equally clear that the remedy is given to the vendor alone. He only is spoken of in the code; he alone is injured by the failure of the first purchaser to comply with the terms of the adjudication. Every suit, therefore, prosecuted for the recovery of the damages thus liquidated, involves a threefold inquiry. 1st. Whether the plaintiff be the party injured, or the vendor. 2d. Whether he has complied with the conditions required of him, by law, by putting the first purchaser in default and thereby entitled himself to prosecute the *folle enchère*; and 3d. Whether the re-sale has been preceded by the requisite notices, and conducted fairly and legally.

In the case now before the court, the first branch of the inquiry leads us to look into the contract between the Messrs. Frerets and others, and the municipality, which has been

much discussed during the argument. The first question which presents itself in relation to that contract, is not how it is to be classed, whether as a sale, or a power to sell, coupled with an agency, but whether its object was lawful, and the contract itself binding between the parties, and not reprobated by law; and next, whether it vested in the municipality such an interest and right as to entitle it to maintain the present action. At the time the last sale at public auction took place, the Messrs. Frerets, and others, had been fully paid and satisfied for the price of the whole property; and, consequently, although still bound to execute conveyances, and to warrant towards the purchasers of the lots, yet it was quite immaterial to them for what price any particular lot might be sold. They had nothing more to receive. The result of the second sale, concerned the municipality alone. The corporation, and none other, could gain or lose by the re-sale of the lots purchased originally by the defendant. The contract, such as it is, was between the original proprietors, and the municipality appears to have accomplished an object of public utility without being obnoxious, so far as we can perceive, to any serious objection. Whether the persons are to be regarded as vendors directly to the municipality of the entire property, or as promising to become such for particular parts of it to such persons as might purchase at a public sale, to be conducted by the municipality at its risk, does not appear to us important to inquire in the present case.

The view we have taken of the last branch of inquiry, to wit: the manner in which the last sale was conducted, and the property adjudicated to the municipality, renders it unnecessary to inquire whether the public notice was sufficient, and whether the sale was preceded by such steps as the law requires to put the first purchaser in default. Conceding to the plaintiffs the advantage of a substantial compliance with all the legal pre-requisites, upon which we express no positive opinion, we come to what we regard as the principal question in the case: Was the auction conducted legally, and was the municipality competent to become a bidder and a purchaser?

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Even admitting, for the sake of the argument, that the Messrs. Frerets were the real vendors at the auction sale, what was the true position of the municipality? The Frerets had nothing more to receive for whatever amount the lots might be sold; and, consequently, whatever amount may have been bid by the municipality, nothing was to be paid. The corporation was manifestly a nominal bidder, not a serious one. It was immaterial so far as its treasury was concerned, whether it bid one dollar or one thousand. If that corporation was not already vested with the legal title, at least it may be said that the original proprietors had nothing more to claim from it on account of the price. If, under these circumstances, the property had been adjudicated to a third person, and it was discovered that the municipality had been permitted to bid, and the purchaser had refused to comply with the terms of the sale, and insisted on treating the sale as null, on the authority of *Baham vs. Bach*, 13 *Louisiana Reports*, 287, and the principles therein recognized as governing sales of that kind, how could the cases be distinguished; or upon what principles could he be said to be bound, unless it was previously known that the corporation had reserved the right to bid? How can such a bid be distinguished from a false bid, or offer, which is reprobated by the law? If, under such circumstances, the person to whom the property may have been adjudicated, would be entitled to relief *à fortiori*, should the adjudication not be conclusive upon one against whom it operates like the verdict of a jury in assessing damages for the non-performance of a previous contract?

This objection has been very ingeniously answered by the counsel for the plaintiffs. We give his own words. "What then is the decision in the case of *Baham vs. Bach*? That the owner of a property offered for sale at public auction has no right to bid at the sale, unless he has publicly reserved to himself that right. Why? Because his conduct is such as to raise in the minds of the bystanders, false impressions as to the real value of the property; because it is a fraudulent artifice, inducing them to make higher bids; because the

seller thereby profits at the expense of the purchaser, to the full amount of the enhanced bid elicited by this fraudulent artifice. Compare with this decision, and the reasons on which it is based, the situation of the vendor who exposes property at the *folle enchère*; a proceeding, the true nature of which is merely, as we have already shown, the fixing a measure of liquidated damages to be paid by the first purchaser for his breach of contract. Does the vendor, by bidding at this second sale, and giving more for it than any one else, profit at the expense of the purchaser, or does he not, on the contrary, assist him in diminishing the measure of damages? If this were a question between third persons who came to bid at the sale, they might, with some appearance of justice, invoke in their support the decision of *Baham vs. Bach*, but when the defendant, in the *folle enchère*, complains that the vendors were the highest bidders, he complains that a lower bid was not taken, or, in other words, that the damages charged against him were not heavy enough."

This is certainly specious and imposing; but the fallacy, we think, consists in overlooking the important consideration, that if any fictitious bid be permitted, there is not a fair competition, and the person to be affected by such sale has a right to insist upon all the bidders standing on the same footing; all equally liable to pay, and that every bid should be a serious one. The objection is, that it would discourage bidders, and, therefore, not fair. The party so to be affected might well ask, who would bid against a person who, in consequence of previous arrangements with the vendor, is in no event to pay any thing, even if the property should be nominally adjudicated to him? But the argument at the same time proves too much; it would prove that the first purchaser would have a right to complain that even the owner himself purchased at the *folle enchère*, and that a sale null in itself for want of competent contracting parties, is yet valid so far as it goes to fix the measure of damages against a party who had no right to interfere for his own protection. To such a proposition we are by no means prepared to assent. On the contrary, this

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The owner of property, in prosecuting the *folle enchère*, cannot recover the difference between the first and last sale, if he bids in his own property.

So, the legal owner, or mandatory of the owner, who is alone interested in a sale at auction, is equally incompetent to purchase property at such sale; and, so far as the *folle enchère* is concerned, the sale is null and void.

court after much consideration, and two arguments, sanctioned a very different doctrine in relation to the sale *a la folle enchère*, in the case of *Scott's Executrix vs. Gorton's executor*, and held that the plaintiff could not recover the difference between the prices at the two adjudications, because the last sale was void for want of competent contracting parties, the executrix who had provoked the sale, being the last purchaser.

14 *Louisiana Reports*, 116.

In the case now before us the corporation finds itself in a dilemma; if it was not the vendor it has no right to maintain this action; and if it was, then it could not become the purchaser of its own property. It is difficult to imagine what new title the municipality acquired by the adjudication. It was already in possession; the whole price had been paid, and the original proprietors were bound to warrant the title. But whether we consider the municipality as the legal owner in a strict sense of the word or not, it is certain that, that corporation alone was interested in the result of the sale at auction, and whether owner, or sole mandatory of the owner, was equally incompetent to purchase, and that the sale so far as the defendant is concerned is void. *H*

It is, therefore, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant as in case of a non-suit, with costs in both courts.

STATE OF LOUISIANA vs. JUDGE OF THE COMMERCIAL COURT.

ON AN APPLICATION FOR A MANDAMUS.

An appeal does not lie from an interlocutory judgment, directing the sheriff to deliver up a steam-boat sequestered at the suit of the plaintiffs, on the defendants giving bond and security in a sum sufficient to cover the plaintiff's demand.

The plaintiffs, J. A. & T. Cowles, in the original suit, out of which the present proceedings grew, by their agent in New-Orleans, made affidavit, that the defendant, John Haggerty, was justly indebted to them in the sum of eight thousand one hundred and eleven dollars, with interest ; that they have a privilege or mortgage on the steam-boat Corvette, owned by the defendant, who resides out of the state, and fear that he will remove the same out of the jurisdiction of the court, or dispose of the same during the pendency of this suit. They pray that said boat be sequestered, and taken into possession by the sheriff.

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Stephenson & Coffin came into court, and applied to bond the boat ; and on a rule to show cause, and having heard the parties, the judge ordered that they have leave to bond the steam-boat Corvette, on giving security in the sum of fifteen thousand dollars. From this order the plaintiffs prayed an appeal, which the judge refused.

They have now applied for a *mandamus*. The judge, in answer to the application, says, he does not consider that the plaintiffs can suffer any irreparable injury, as the bond must be considered a substitute for the boat.

Peyton and Smith, for the application.

Simon, J., delivered the opinion of the court.

A rule having been taken on the judge of the Commercial Court, to show cause why he should not grant a suspensive appeal from an interlocutory judgment by him rendered in the progress of this suit, directing the sheriff to deliver to Young Stephenson and William Coffin, the steam-boat Corvette, attached and sequestered at the suit of plaintiffs, on said defendants giving their bond in the sum of fifteen thousand dollars, with security, &c., shows for cause : That Stephenson & Coffin, to whom, it is alleged, that a fictitious and simulated sale of the boat attached and sequestered, was made by Haggerty, their co-defendant, have applied to bond the boat, and given bond, with sufficient security, in the sum ordered by the court ; but that Haggerty did not appear and

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join the motion to bond. He further shows, as his opinion, that the right to bond is given to the defendants by the Code of Practice; and that if, hereafter, the property should be found to be Haggerty's, his co-defendants would be liable on their bond for the amount of the plaintiff's claim, on their failing to produce the boat. He further gives, as his principal reason for refusing to grant the appeal, that the plaintiffs cannot suffer an irreparable injury, as the bond ought to be considered as a substitute for the boat.

The object of the plaintiffs' action is to recover a sum of money, to secure which, they allege to have a mortgage and privilege on the steam-boat Corvette; it is true that they allege, in their petition, that Haggerty is the real owner of the boat, but they aver, also, that his co-defendants have an apparent and pretended title to said boat, which they attack as fraudulent and simulated; and in order to exercise their alleged right of mortgage and privilege, they seek to annul the sale.

We are not now to decide on the propriety or legality of the interlocutory judgment rendered by the judge of the Commercial Court; but it appears to us, that, instead of the boat itself, which, during the pendency of this suit, would lie idle in the port of New-Orleans, the plaintiffs having a bond and security to the amount of fifteen thousand dollars, it is a sufficient substitute for the boat. We agree with the judge that the interlocutory judgment complained of, cannot cause an irreparable injury, (Code of Practice, 566,) and we think he did not err in refusing to grant the suspensive appeal prayed for by plaintiffs.

Let the rule be discharged.

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| 1. Where cotton is shipped to factors, with instructions to lay out the proceeds in groceries, and if the purchases should exceed the amount, other cotton will be remitted by the first boat; they cannot hold the cotton in their possession, subject to any balance on such purchases, against attaching creditors of the owners... .. <i>Smith & Wright vs. McCall et al.</i> , | 7 |
| 2. An assignment by a debtor in New-York, of his property, in trust for the benefit of <i>all his creditors</i> , wherein credits in Louisiana are assigned, cannot defeat an attachment levied on those credits by even a New-York creditor, before <i>notice</i> of the assignment to the garnishee or debtor.
<i>Kimball vs. Plant et al.</i> , | 10 |
| 3. The defendant in attachment may bond the property, and thus dissolve the attachment. He has a right to this, in order to relieve himself and his surety from the effect of his obligation, resulting from his attachment bond..... <i>Pailhes vs. Roux</i> , | 82 |
| 4. An attaching creditor may, at the same time, proceed by personal citation against his debtor.... <i>Gibson vs. Huie</i> , and <i>Diggs vs. Hunter et al.</i> , | 124 |
| 5. Where a defendant <i>averts</i> that a certain note held by him, and attached in the hands of the makers, was transferred by him before service and notice of the attachment, and <i>fails to show this</i> , it will be taken for granted he is still in possession, and the attachment will stand.
<i>Same case, on a re-hearing</i> , | 129 |
| 6. If a promissory note be attached in the hands of the makers before it is due, the holder, who is defendant, cannot defeat the attachment by transferring the note, after notice to the garnishees..... | <i>ib.</i> |
| 7. Attachments of negotiable paper in the hands of the makers, does not restrain its negotiability, provided the transfer be made before maturity, and without notice of the existing attachment to innocent purchasers..... | <i>ib.</i> |
| 8. Where the plaintiff in attachment sets forth in his affidavit, that the sum claimed in the petition " <i>is justly due him</i> ," and the petition states that "the defendant is <i>indebted to him</i> " in this sum, the affidavit is sufficient.
<i>Boone vs. Savage</i> , | 169 |
| 9. Attachment will lie against a person who <i>has not resided one year</i> in the state, even after he has elected his domicile here..... | <i>ib.</i> |
| 10. An attachment lies against the property of a corporation, incorporated by the laws of another state.
<i>Martin, Pleasants & Co. vs. Bank of Alabama</i> , | 415 |
| 11. Negotiable notes cannot be attached in the hands of the maker after they are put in circulation. It can only be done by either seizing the notes, or attaching them in the hands of a person, holding them as the property of the debtor..... <i>Sheets & Grover vs. Culver et al.</i> , | 449 |

12. The attachment allowed by the act of 1826, in the case of a debt not yet due, was not intended as a means of bringing the debtor into court, but only as a conservative measure..... *Adams et al. vs. Day*, 503
13. Where the defendant in attachment shows, by *prima facie* evidence, that the facts stated in the affidavit are untrue, it will throw the burden of proving their verity on the plaintiff..... *ib.*
14. And when there is no notice given of an assignment of a debtor's property, it is liable to attachment in his hands. *ib.*
15. Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation..... *Kimball vs. Plant et al.*, 511

AUDITOR.

1. Where, by consent of the parties, the case is submitted to an auditor, with the powers of an amicable compounder, his award cannot be opened by the court, but must be homologated as it stands, having the effect of a definitive judgment..... *Deneufbourg vs. Gaiennit*, 53

BAIL.

1. Where a bail bond is taken in pursuance of an order of court; the entry on the minutes requiring bail in seven hundred dollars, and the bond is taken in the penalty of seven thousand dollars; and the judge at a subsequent term, corrects and alters the minutes to seven thousand dollars: *Held*, that the bond is not thereby invalidated; and the sureties can only be relieved on the score of error in signing, which does not result from altering the minutes, whether done legally, or illegally..... *State vs. Frith et al.*, 191
2. The sureties in a bail bond are not entitled to an *exoneratur*, when they have made no formal surrender of the principal; even if he be confined in prison for a subsequent offence, not bailable, and afterwards makes his escape..... *ib.*
3. So, also, bail are not exonerated when they have made no surrender of the principal; even where the sheriff and constable both resign; for these officers are required to act until their successors are appointed..... *ib.*

BILLS AND NOTES.

1. Where a note is in possession of the payee at his death, although inclosed by him in a letter with directions to hand it over to a creditor afterwards, it will be considered as still belonging of right to his succession. *Rasch vs. Johns & Co.*, 46
2. The makers of a note may plead in compensation against the endorsee or holder, any demand or claim which they had against the payee at the time of its transfer..... *ib.*

3. There is no necessity for any demand, or protest for non-payment of bill, when the non-acceptance by the drawees, and protest and notice to the drawer, fixes his responsibility..... *Pecquet & Lacroix vs. Mager*, 74

4. Foreign bills returned with legal protest, entitle the holder to twenty per cent. damages, under the statute..... *ib.*

5. Where a notary makes diligent search, and uses all diligence to obtain information of the residence of the endorser in vain, he is then fully justified in putting the notice in the post-office, although the endorser may actually reside in the city at the time.

Vigers & Co. vs. Carlon, f. m. c., 39

6. Where a note is made payable at a certain place, payment must be demanded there, before a recovery can be had against the sureties in the note..... *Fort vs. Cortes & Le Place*, 180

7. It is not sufficient to show that the sureties had no funds in the place of payment to meet the note at maturity, in order to charge them; for it is incumbent on the maker, and not on them, to provide funds at its maturity..... *ib.*

8. The sureties in a note may oppose to the action, all the exceptions allowed to the maker, and which are inherent to the debt..... *ib.*

9. Where the notary certifies that, "notices of protest were served on the endorser, by letter delivered to them personally by L," &c., it is insufficient. The notary cannot certify what was done by another, so as to bind the endorser..... *Shepherd vs. Jonti et al.*, 246

10. A simple denial of the plaintiff's right to sue as the holder of a negotiable note or instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or mislaid..... *M. Kinney vs. Beeson's Estate*, 254

11. In a suit against the maker of a note, it is no ground of defence that it was improperly transferred by the curator of an estate to which it belonged, to the holder, when it is endorsed in blank..... *ib.*

12. The vendor of personal property may produce evidence to show that the note sued on was given for the price of certain furniture, to enable him to enforce his privilege against it in the hands of his vendee.

Polo & Tivilier vs. Natili et al., 260

13. Where the defendants are interrogated as to the consideration of the note sued on, and neglect to answer, their silence must be taken *pro confessis*, and it will be deemed full proof..... *ib.*

14. According to a statute law of Mississippi, all notes made there are subject to every equitable defence against a *bona fide* endorsee, which could be set up against the payee; and when sued on here, the case must be governed by the *lex loci contractus*..... *Barrett vs. Walker*, 303

15. The general rule is well settled that when a promissory note is made payable at a particular place, a recovery cannot be had on it without proof of a demand at the place of payment.....*Allain & Tremoulet vs. Lasarus*, 327

16. There are exceptions to the general rule, and by the commercial law it is not necessary for the payee to prove a demand of the acceptor of a bill in order to recover of him..... *ib.*

17. So, where the payee is in possession of a note, the burden ought to devolve on the obligor, or maker, to show a readiness and offer to pay, or funds placed in the hands of the payee for that purpose, in order to exonerate himself..... *ib.*

18. It is necessary to allege and prove the endorsement by the payee of a draft, in order to entitle the holder to recover.

Nott et al. vs. Brander et al., 368

19. Where a note is made payable at the counting-house of A, and the firm is changed to A B, before the note becomes due, a demand at the counting-house of A B will be good.....*Sanderson vs. Oakey et al.*, 373

20. The possession of a promissory note, together with the receipt, showing it had been endorsed to another for collection, is evidence of its re-transfer so as to authorize the holder to sue as owner.

Waring vs. Crawford, 376

21. A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note..... *ib.*

22. Where a party to a bill, or note, puts his name on it, he is presumed to have done so as surety, unless this presumption is destroyed by other circumstances appearing.....*Lawrence & Hill vs. Oakey et al.*, 386

23. But, where the endorser's names appear first on a bill, although not the payees, and no explanatory evidence is offered, their endorsement will be considered as a direct and positive undertaking on their part, and not conditional..... *ib.*

24. By endorsing a bill not payable to their order, the defendants became guarantors for its punctual payment at maturity..... *ib.*

25. The certificate of the notary is *prima facie* evidence of a demand on the maker of a note; and that it was made at his domicile, although it be not so set forth in the petition.....*Poydras vs. Bell*, 391

26. A certified copy of the notarial protest, and certificate of notice to the endorsers, &c., is sufficient evidence of the protest and notice to the endorser.....*Whittemore vs. Leake & Howell*, 392

27. Where the endorser lived seven or eight miles from town, notice of protest put in the post-office, addressed to him as of that parish and town, being the place where he received his letters, was held sufficient service of notice..... *ib.*

28. The defendant was sued on his promissory notes given for a number of "city bonds," payable in twenty years, with six per cent. interest, in semi-annual dividends, which being accidentally *lost or destroyed*, he asked for new ones, or a rescission of the contract: *Held*, that he could demand neither; but was bound to pay his notes, as the *loss of the bonds* did not diminish the city's obligation to pay them and the accruing interest as it became due.....*Mayor et al. vs. Caldwell*, 499

29. The transferee of a note *not endorsed*, but transferred by a special assignment of the payee, written on the back of it, cannot maintain an action against the transferor.....*Martin vs. M-Masters*, 420

30. The transferor is only responsible for the *existence* of the debt at the time the note is transferred..... *ib.*

31. Where the transferor of a note obtained the temporary possession of it, and tortiously added the words "*without recourse*," to the written assignment, as it did not alter the legal obligation of the parties, the court is not bound to notice it..... *ib.*

32. The certificate of the notary who makes the protest, is *prima facie* evidence that due diligence was used to find the residence of the maker and endorser of a note, and that notice to the endorser was put in the post-office.....*Delavigne vs. Arnel*, 437

33. The nature and degree of diligence used to find the residence of the parties to a note, and make demand and give notice to the endorser, may be inquired into on the trial, to rebut the presumption arising from the notary's certificate. This presumption will, however, yield to contrary proof..... *ib.*

34. Notice to an endorser, left at his office with a clerk, he not being in, is sufficient to render him liable.....*Edson vs. Jacobs*, 494

35. The maker of a note cannot complain, that demand of payment was made after the last day of grace.....*Union Bank vs. Mortec*, 539

BILL OF LADING.

1. Where the plaintiff purchased certain cotton, and made advances on the bill of lading; and the cotton was delivered to the defendants under a previous contract with the seller, before the bill of lading came to the possession of the plaintiff, he cannot recover the cotton.

Hepburn vs. Lee & Hardy et al., 76

2. The bill of lading can have no effect until its delivery; and, at that time, the cotton being in possession of the defendants under a previous contract, having no privity or connection with the one under the bill of lading, they were in no way responsible..... *ib.*

CITATION.

1. A return of service of petition and citation, which states that they were left with W. F., a free white person over fourteen years of age, residing at the *domicil of the defendant*, is insufficient. If he be absent, citation must be left at the defendant's *domicil*, with a free person apparently above fourteen years of age, residing there.

Ballard et al. vs. Lee's Administrator, 211

2. If a judgment by default be taken before the defendant is in court, by proper service of citation, although he be afterwards personally cited, final judgment cannot be entered without a judgment by default being again taken *ib.*

3. It must appear by evidence, that the appellee resides out of the state at the time of service of citation on his attorney, or it will be insufficient.

Ratliff vs. His Creditors, 292

CITY COURT OF NEW-ORLEANS.

1. The City Court of New-Orleans is without authority to grant an order of seizure and sale; especially when the property to be seized is situated out of the city limits..... *Elwyn vs. Jackson et al.*, 411

2. But the jurisdiction of the City Court does not extend to actions of a *real nature*. It is limited to actions *in personam*; except in cases of attachment, in which authority is expressly given..... *ib.*

CLAIMS ON GOVERNMENT.

1. In the seizure and prosecution of a vessel for the violation of law, by the collector, surveyor and naval officer, in a case where no law provided for their remuneration, they rendered meritorious services, but these impose no obligation on the government, either in law or equity, to compensation; and which could not be set up as a legal or equitable offset to any demand of the government against *them*; although, under the rules of law, any specific demand imposing even an equitable obligation, might be so pleaded..... *Emerson's Heirs vs. Hall*, 1

2. Services rendered under the requirements of a contract, or of law, for which a compensation is fixed, constitute a legal demand, while those rendered under an authority which is casual, or in some degree discretionary, may constitute an equitable claim..... *ib.*

3. A claim against a foreign government for *spoliations*, is founded on the law of nations, and the obligation is perfect on the offending government, which will be enforced by the government of the injured citizen *ib.*

4. A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets, and it does not descend to the heir. But, if the government, from motives of public policy, or any other consideration, thinks proper to make a grant of money to the heirs of the claimant, they receive it as a gift, or a pure donation..... *ib.*

COLLATION.

1. Every donation, or advantage, is liable to be collated among co-heirs, unless expressly exempted by the donor..... *Burton's Heirs vs. Burton et al.*, 352

2. So, in an action of partition among co-heirs, slaves which have been given, the donee is not permitted to collate them in kind, but according to their value at the time of the donation..... *ib.*

COLORED PERSONS.

1. Children of color (from a white person) are not allowed to prove their paternal descent where they have not been acknowledged; but this may be shown by proof against them by the adverse party in order to annul a sale made to them, as a disguised and simulated donation to incapable persons..... *Robinett et al vs. Verdun's Vendees*, 542

2. So, children of color, (from a white person) not acknowledged, cannot inherit or receive by donation, *inter vivos*, or *mortis causa*, even one fourth of the ancestor's estate; and, if by a disguised sale, or donation, an attempt is made to give them a greater amount of property than can be legally disposed of, it is not reducible to the disposable portion, but absolutely null..... *ib.*

3. Colored children of a white person, not acknowledged by him, are incapable of receiving any thing by inheritance or otherwise..... *ib.*

COMPENSATION.

1. Compensation cannot take place between debts which a party owes an estate under administration, and those which it owes him. He still retains his interest to make opposition as a creditor; although it may turn out, ultimately, that he is a debtor for a balance due the estate.
..... *Duncan's Syndic's vs. Duncan's Heirs*, 556

CONTINUANCE.

1. The granting a continuance is in the discretion of the judge *a quo*, who best knows the parties and their attorneys; although, if a continuance be improperly refused, this court has power to grant relief; yet, it will not interfere in a case where the discretion of the inferior judge has been correctly exercised..... *Hopkins et al. vs. LaPlace, Syndic, &c.*, 141

2. Where an absent witness has been duly summoned, and the party makes affidavit setting forth his materiality, and the material facts expected to be proved by him, and that he expected his attendance on the day fixed for trial, it will be sufficient ground to obtain a continuance.

Klathenhoff vs. Ardry, 301

CONTRACT.

1. Where the plaintiff purchased certain cotton, and made advances on the bill of lading, and the cotton was delivered to the defendants under a previous contract with the seller, before the bill of lading came to the plaintiff's hands, he cannot recover, although defrauded by the seller.

Hepburn vs. Lee & Hardy et al., 76

2. The bill of lading could have no effect until its delivery; and at the time the cotton being in possession of the defendants under a previous contract, having no connection or privity with the one under the bill of lading, they are in no way responsible..... *ib.*

3. The party claiming damages for loss of rent, occasioned by the non-delivery of a house according to contract, must show that he put the adverse party *in default* before he can recover..... *Kirkman vs. Barton*, 80

4. The form of a contract of sale may be given to a different contract, as a mortgage, when the property is absolutely conveyed. Between the parties to the conveyance, its real nature must be established by a counter-letter; but those who are not parties to the contract, and have an interest in establishing its real nature, may do so by testimony.

Frost & Johnson vs. Bebout et al., 104

5. According to a statute law of Mississippi, all notes made there are subject to every equitable defence against a *bona fide* endorsee, which could be set up against the payee; and when sued on here the case must be governed by the *lex loci contractus*..... *Barrett vs. Walker*, 303

6. Where a vendee has not complied with his agreement, he cannot complain and set up as a matter of defence to his note, that the vendor has not extinguished a certain mortgage, when this failure was the consequence of his not complying with his stipulation to pay in a certain manner *ib.*

7. Where a vendor and mortgagee goes before a notary and makes a declaration of release of his mortgage on certain conditions, it cannot have the force of a contract without the assent of the mortgagor, although the stipulation is in his favor. But the declaror is bound to carry into effect the intention expressed, whenever the other party signifies his readiness to accept the terms offered, if they have not been retracted... .. *Williams vs. Duer*, 523

3. Where an undertaker gave an order on the owner to the plasterer, payable out of the second and third instalments of the contract for

building, when the house was finished, and which was accepted by the owner: *Held*, that no subsequent agreement between the undertaker and owner prolonging the time of finishing the house, could change the obligation of the acceptor of the order; and, although the house was destroyed by fire in the mean time.....*Sargeant vs. Daumoy*, 43

9. Neither party to a contract has any power to change his obligations to a third party growing out of said contract, by subsequently altering or prolonging its execution, as between themselves..... *ib.*

COURTS.

1. The Supreme Court disclaims a general superintending control over the inferior jurisdictions; but it will exercise every power incident to its appellate jurisdiction, as defined by the constitution, and in the forms prescribed and established by the legislature.

State of Louisiana vs. Judge Bermudez, 478

2. The authority of the legislature must, however, be considered in relation to the constitution, which allows this court appellate jurisdiction only, and in matters which have a tendency to aid this jurisdiction.... *ib.*

3. This court cannot direct inferior courts what judgments they are to render, but in cases in which it is their duty to *proceed* and take cognizance, they may be so directed, and their judgments be appealed from as in other cases..... *ib.*

4. It is only in relation to courts acting judicially, and in cases in which an appeal might be prosecuted to this court after final judgment, that it will issue writs of *procedendo* or *mandamus*..... *ib.*

5. So, on the refusal of the judge of the probate court, on an application of the tutrix to appoint an under tutor to her minor children, and order a family meeting, with a view to relieve her property from a general mortgage, and give a special one, a peremptory *mandamus* will be awarded, requiring him to proceed..... *ib.*

6. The nullity of a probate sale cannot be sought in a direct action in the District Court. The *order* of sale by the probate court is held to be a judgment which protects purchasers under it....*Graham's Heirs vs. Gibson*, 146

CORPORATION.

1. Where a corporation is a mere creature of legislative will, established for the general good, endowed by the state alone, the legislature may, at pleasure, modify the act of incorporation or law by which it was created. The trustees of such a corporation are the mere mandatories of the state.*Montpelier Academy Trustees vs. George et al.*, 395

2. But where certain individuals are incorporated, and constituted a body politic, as trustees of an academy, with power to acquire property,

and receive donations from individuals and the state, on condition to establish an academy and educate pupils, and also receive a yearly grant from the state, on condition to teach a certain number of indigent children; and where such corporation has complied with the conditions: *Held*, that the incorporators acquired vested rights in the nature of a contract which cannot be taken from them by the state, without a manifest violation of the constitution of the United States, article 1, section 10.

Montpelier Academy Trustees vs. George et al., 395

3. A corporation or bank, in which the stock is entirely owned by another state, and created by its laws, may, nevertheless, be sued in the courts of this state....*Martin, Pleasants & Co. vs. Branch Bank of Alabama*, 415

4. An attachment lies against the property of a corporation incorporated by the laws of another state *ib.*

5. Where the signatures of the proper officers of a corporation are proved, and the seal is affixed, the court are to presume the officers did not transcend their authority, and that the seal was affixed according to the requirements of the charter*Adams vs. His Creditors*, 454

6. Courts may, however, when a deed is signed by the officers and sealed with the seal of the corporation, look beyond the seal, but it is *prima facie* evidence that it was so affixed by proper authority. The contrary must be shown by the adverse party *ib.*

DAMAGES.

1. A party who has reasonable grounds to believe that he has a good cause of action, and brings his suit, is not liable in damages to the adverse party, if he loses or discontinues his case.....*Henry vs. Dufilho, Jr.*, 48

2. A party plaintiff is not bound to repair the damages which he may cause to others by the legitimate exercise of his legal rights..... *ib.*

3. But, if a person sues without color of title, and malice is shown, or may be inferred, the adverse party is entitled to recover in an action of slander of title..... *ib.*

4. The jury are the peculiar judges of the *quantum* of damages.

Morgan vs. Lard et al., 236

5. Damages may be assessed at an *annual* sum; and where the petition shows no period from which they shall be computed, and the verdict affixes none, the court may give them from judicial demand, and until the surrender of the premises to the successful claimant..... *ib.*

6. Where a sheriff acts honestly, being a public officer he must be protected against excessive and vindictive damages.

Smith vs. Bradford et al., 281

7. So, where slaves are illegally removed from a plantation they are cultivating, by the sheriff under a writ of seizure, a bare remuneration for the *loss of time* should be the measure of damages..... *ib.*

DEBTOR AND CREDITOR.

PAGE

1. Where the plaintiffs claim the value of certain property, seized by the defendants, as belonging to the common debtor, and consent that it be sold, and receive the proceeds, they cannot recover the real value from the seizing creditors if it was sacrificed.....*Lowery & Co. vs. Lavillebeuvre et al.*, 55
2. A debtor doing business as a merchant without any fixed domicile in the place, living with his family in a boarding-house, is liable to arrest and sequestration of his moveables and baggage, at the suit of his landlord.
Wooster vs. Salzman, 98

DEMAND.

1. Want of amicable demand, specially pleaded and shown, saved the defendant the costs of the *original citation*, and also those of appeal, by reversing the judgment.....*Saillard vs. Turner et al.*, 259
2. Where a note is payable at a particular place, payment must be demanded *there*, before a recovery can be had against the sureties in the note.....*Fort vs. Cortes & La Place*, 180

DOMICIL.

1. The articles 42 and 43, of the Louisiana Code, only provide for a change of domicile by persons already residents of the state, and not those coming from another state.....*Boone vs. Savage*, 169
2. It requires a residence of one year in this state by persons coming from another state, to acquire a domicile. Until then, they are liable to be sued by attachment as *non-residents*..... *ib.*

DONATION.

1. Every donation, or advantage given to heirs, is liable to collation among the co-heirs, unless expressly exempted by the donor.
Burton's Heirs vs. Burton et al., 352
2. The donation of slaves imparts an absolute transfer of property, and they are at the donee's risk, who is entitled to all the profits and increase, and must bear their deterioration and loss..... *ib.*

EVICITION.

1. Since the adoption of the Louisiana Code, *as an amendment*, and in repeal of the Code of 1808, the *increased value* of the property at the time of eviction is not *necessarily* the standard of damages to be paid by the warrantor to the party evicted.....*Webb vs. Gorman et al.*, 38

EVIDENCE.

1. A duly certified copy of a sheriff's or city marshal's deed, made by the clerk of the court in whose office the sale or deed of conveyance is recorded, will be received in evidence, in the same manner, and have the same effect as a duly certified copy of an authentic act. PAGE

Bailly & Son, f. p. c. vs. Percy, f. w. c., 14

2. Where the sheriff's deed only conveys all the right, title and interest of the defendant in execution, it is necessary to inquire what these rights, &c. were, and to show that they were superior in dignity to the title of the adverse party, to enable the plaintiff to recover in a petitory action..... *ib.*

3. Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had, and every circumstance becomes material to ferret out the fraud.

Cecile, f. m. c. vs. St. Denis, f. w. c., 184

4. An order discontinuing a suit, may be used as evidence of this fact, as soon as it is entered on the minutes. It does not require the signature of the judge..... *Morgan vs. Whiteside's Curator,* 277

5. The testimony of one witness corroborated by a mortgage, will be deemed sufficient to prove an open account over five hundred dollars, when it appears the mortgage was given to secure payment of all liabilities the plaintiffs were to come under for the defendant, and that the account embraced these objects..... *Allain & Tremoulet vs. Lazarus,* 324

6. Where the plaintiff sues to recover the value of work and labor done for the defendant, according to a bill of prices agreed on for part of it and for extra work, he will be allowed to produce evidence of the value of all the work performed..... *Collings vs. Hamilton,* 339

7. In an action on a special agreement for the price of work, or services rendered, the party may introduce evidence of the value of the work also..... *ib.*

8. In an action for the return of the price on account of redhibitory defects in a slave, although the demand exceeds five hundred dollars, it may be proved by a single witness, when the demand grows out of a contract evidenced by a notarial act..... *Armor vs. Huie,* 346

9. In an action to render the captain and owners of a steam-boat liable in damages for the value of sundry bags of corn shipped on board and delivered in a damaged state, evidence will not be received to show that the corn was purchased from the captain, in order to make him liable as seller..... *Wilcox et al. vs. Halderman et al.,* 357

10. In an action for slander, for calling the plaintiff a "thief, &c.," the defendant cannot offer the declaration of the plaintiff's father in evidence, reproaching the son with having committed a crime.

Quartrevaux vs. Caboche, 365

11. The declarations of the father, reproaching his son with misconduct, cannot be given in evidence against him in an action against a third person for slander. Nothing the father may have said can assist the defendant in establishing his charge. It is hearsay evidence, and the father could not be heard if he were offered as a witness.....*Quartrevaux vs. Cuboche*, 365

12. A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note.
Waring vs. Crawford, 376

13. Where the absence of a witness is not accounted for, and he is not dead, a note of his testimony, not signed, is inadmissible in evidence.
Lesassier vs. Dashiell, 467

14. A document signed by L., for B. Z. C., register of the land-office, is inadmissible in evidence. Nothing shows that the register may act by proxy, or deputy; or that he delegated his powers to another to affix his signature..... *ib.*

15. The defendant under an averment to rescind the sale to him by the plaintiff, cannot offer outstanding titles in others in evidence, when he is in possession. If he was in danger of eviction, the most he could do would be to withhold the price until security was given..... *ib.*

16. Where the *presumptions* arising from the whole evidence, which leaves the case doubtful, preponderate in favor of the defendant, and the district judge, who tried the case, gives judgment in his favor, it will not be disturbed.....*Meyers et al. vs. Guesnard*, 518

17. So, where a vessel was apparently abandoned by the surviving partner, and taken into possession by the original owner, who paid the charges on her, and held the notes of the purchasers for half the price, but had offered to rescind the sale, and the question of acceding to this offer left doubtful: *Held*, that after the lapse of ten months, the purchaser will not be allowed to recover her back..... *ib.*

18. The record is the best evidence to show that certain persons were parties to particular proceedings had in the Probate Court, and is admissible for such purpose.....*Williams vs. Duer*, 523

EXCEPTIONS.

1. A dilatory exception, taken *in limine litis*, may be pleaded in the beginning of the answer to the merits.....*McGuire vs. Peck*, 187

2. The party who fails to offer evidence of the facts on which his exception rests, and proceeds to trial on the merits, may be held to have waived the exception.....*Gay vs. Ardry*, 298

EXECUTORS, ADMINISTRATORS AND CURATORS.

1. A B, executor of C D, cannot contract with A B; because A B, executor, and A B, are both one natural person. So, the agent of an executrix for the sale of the estate she administers, cannot contract with himself, and buy at the sale, part of the estate; because the agent of the executrix is seller and buyer, and are both one natural person; there is no mutation of property.....*Scott's Executrix vs. Gorton's Executor*, 141
2. Where the wife is executrix, selling the property of a succession, and her husband acts as her agent in making the sale, and purchases; if there be any mutation of property, it passes to the husband and wife, and belongs to the community. The law inhibits all contracts between husband and wife..... *ib.*
3. Executors as well as curators, tutors and other mandatories, are prohibited from purchasing part of a succession administered by them, on pain of nullity, at a sale of property to pay the debts of the succession.
Same Case, 115
4. The nullity resulting from a prohibited sale to executors, of property administered by them, is *absolute*. No subsequent ratification can give it effect against third persons, *interested*, who are not parties to the ratification..... *ib.*
5. Where an administrator sues in the District Court, and exhibits evidence of his appointment, this court cannot inquire, collaterally, into the propriety of such an appointment by the Court of Probates.
Dunbar vs. Thomas, 332
6. An administrator has the right to enforce payment of all debts due to the estate he administers, which are still in his hands, and the proceeds of which, when paid, are liable to the debts of the estate..... *ib.*

EXECUTORY PROCEEDINGS.

1. In the executory proceedings against mortgaged property which has passed into the hands of a third possessor, *three days* notice must in all such cases be given to the defendant, *after seizure*, before the property is advertised for sale.....*Saillard vs. White*, 84
2. Where the vendor's act of sale and mortgage, contains the clause *non alienando*, there is no oath required, or notice to the third persons in proceeding against the mortgaged property by the *via executiva*.
Moss vs. Collier, 133
3. If the petition pursues the forms, and prays for an order of seizure and sale, the fact of the clerk issuing a citation to the defendant, will not change the suit into the *via ordinaria*..... *ib.*

PRINCIPAL MATTERS.

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4. Where the seal of the court is not affixed to the record of a judgment suit in another state, and the certificate of the clerk is irregular, it will not furnish sufficient authentic evidence to authorise the executory process to issue on it in this state.....*Armstrong vs. Levy et al.*, 157

5. Where the legality of an order of seizure and sale had been passed upon in an opposition made by the defendant, the court will take no further action in the matter, when brought up on a rule to show cause why an *alias* order of seizure and sale should not be set aside.

Florance vs. Wilcox, 58

FACTOR AND CONSIGNEE.

1. A factor or agent will not be liable for the loss on sales of the article consigned, if it appears from the evidence it was deteriorated when received, and that he acted with diligence and fidelity in the discharge of his trust.

Bogert & Kneeland vs. Dorsey, 430

2. The privilege given to factors in article 3214, of the Louisiana Code, is intended to aid the interests of commerce, and the word *advances*, used therein, is not to be restricted in its meaning to actual disbursements, but must be construed in an enlarged sense, with reference to commercial usage, and include *acceptances* not yet paid.

Turpin vs. Reynolds : Hobson & Gooch, garnishees, 473

3. So, where factors or commission merchants accepted drafts on the faith of the defendant's promise to ship and consign a certain quantity of cotton : *Held*, that the consignees will hold the cotton so consigned against the attaching creditors of the defendant..... *ib.*

4. Where cotton is shipped to factors, with instructions to lay out the proceeds in groceries, and if the purchases should exceed the amount, other cotton will be sent. They cannot hold the cotton in their possession subject to any balance on such purchases against attaching creditors.

Smith & Wright vs. McCall et al., 8

FRAUD.

1. Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had, and every-circumstance becomes material to ferret out the fraud.

Cecile, f. m. c. vs. St. Denis, f. w. c., 184

2. A sale having all the forms of a legal and authentic act cannot be treated as a nullity, even if *fraud* is alleged. The fraud must be shown in a direct action.....*Burland vs. Carrollton Bank*, 189

GARNISHEE.

A garnishee has no right, as such, to plead for any of the parties litigating for the property in his hands. He is viewed as a stake holder, whose duty it is to declare the truth; and if his declaration be controverted, to support it, and prevent any improper decision to his prejudice.

Kimball et al. vs. Plant, 511

GUARANTY.

1. Where one guaranties the payment of an existing debt, the obligation he contracts is essentially one of suretyship, in whatever form of words it may be clothed..... *Gasquet et al. vs. Thorn*, 506

2. So, whatever may be the character of the primitive obligation, whether an endorsement or other commercial engagement, the guarantor's accessory obligation does not partake of its commercial character, but is absolute if the debt is not paid..... *ib.*

3. The guarantor of a note, endorsed by another, is not entitled to notice of protest in order to render him liable..... *ib.*

4. Contracts of guaranty of existing debts entered into in this state, are to be construed in reference to the municipal law or Louisiana Code, and are not regulated by the *lex mercatoria*..... *ib.*

5. So, in this case, the defendant guarantied the payment of a note, and became the surety of the makers, although it does not appear that the latter were acquainted with his engagement..... *ib.*

6. The defendant as guarantor cannot claim to be discharged from liability by the neglect of the plaintiff to give notice of a demand and non-payment..... *ib.*

HEIRS.

1. In an action for a partition, a former judgment fixing the rank and portion of each heir, inheriting a succession, is *res judicata* when not appealed from; and no one of them can be deprived of his share in the suit for the partition..... *Hooke vs. Hooke et al.*, 22

2. Where two out of six heirs of the whole blood die, after the inheritance is fixed, and their is an heir of the half blood, she will inherit one tenth of the succession of their common mother..... *ib.*

3. If the heir is born and resides in Louisiana, and there is real property situated here, which is sold to effect a partition, the proceeds are considered *realty*, and will descend as such according to our laws..... *ib.*

HUSBAND AND WIFE.

PAGE

1. Where the wife directs her husband to sell her property to pay the children of her first marriage, and she joins him in an act of ratification; she will, nevertheless, have a mortgage claim on his estate, for such portion of the proceeds as he has not accounted for.

Champagne vs. Champagne's Syndic, 51

INJUNCTION.

1. An affidavit which declares that "all the material facts in the foregoing petition set forth, are true," is too indefinite and uncertain to sustain an injunction.....*Sauvinet vs. Poupono, f. m. c., 87*

2. An affidavit for an injunction, must be direct, positive and unconditional; and where it only attests the truth and correctness of the facts and allegations in the petition, which renders the injunction necessary, it is insufficient..... *ib.*

3. On the dissolution of an injunction, the fee of the defendant's attorney may be assessed as special damages..... *ib.*

4. The plaintiffs obtained an injunction restraining the defendant from carrying on a bakery in wooden buildings adjacent to theirs, and in the midst of the town of Alexandria, on the ground of imminent danger to their property, and a nuisance. The jury found twelve hundred dollars in damages for the defendant on his plea in reconvention, for injury and loss sustained by the injunction, which the court refused to disturb.

Martin et al. vs. Nally, 205

5. It is not enough to obtain an injunction staying executory proceedings to show an abstract irregularity. Injury to the applicant, or some apprehension of it, can alone justify a resort to this remedy.

Morgan vs. Whiteside's Curator, 277

6. So, an injunction should not be granted to stay an order of seizure and sale, when it is clear the party has a right to make another seizure by taking out an *alias* order..... *ib.*

7. The law not only requires a statement of the facts showing an injunction to be necessary, before it is granted, but they must be positively sworn to, so as to subject the parties to the penalties of perjury, if not true.....*Le Blanc vs. Dashiell, 274*

INSOLVENCY.

1. An opposition to the provisional tableau filed by a syndic, comes too late when ten days have expired after the order of publication, and when judgment of homologation has been pronounced; although it be not signed.

Lang et al. vs. Their Creditors, 237

2. A new trial will not be granted when a party has neglected to file his opposition to a tableau until judgment of homologation has been pronounced, even if he presents himself and moves for it before judgment is signed..... *Lang et al. vs. Their Creditors*, 237
3. The judgment of homologation of a tableau of distribution, so far as it settles the rank of creditors is final, and *res judicata* as to a subsequent tableau in the same case..... *Lang et al. vs. Their Creditors*, 241
4. So, a creditor placed on the first tableau *without a privilege*, cannot, on the filing of a second or definite tableau, claim a *privilege*, because the funds on which he seeks to enforce it, have not been distributed, but carried to the mass of the ordinary creditors at the head of the second tableau..... *ib.*
5. Creditors having claims against property, surrendered by the insolvents, will not be permitted to litigate their demands separately against the syndics, but will be required to cumulate them with the insolvent proceedings..... *Blois, Tutor, &c. vs. Yard & Blois's Syndics*, 250
6. In a *concurso*, where all the parties are plaintiffs and defendants, any averment made by a creditor in relation to a particular claim, charging fraud and collusion, must *avail all the other* opposing creditors interested in defeating it; because a claim cannot be rejected as to some creditors, and upheld as to others..... *Adams vs. His Creditors*, 454

INSURANCE.

1. It is the duty of captains of steam-boats passing in and out of the Mississippi, on arriving at the pilotage ground to take on board a regular commissioned or competent pilot; otherwise, it is a breach of the warranty of insurance which will discharge the underwriters.

Whitney et al. vs. Ocean Insurance Company, 485

2. It is not sufficient to show that the captain of the boat was skillful and experienced, to discharge the insured from their warranty of seaworthiness, when the boat has been lost without taking a pilot on board. *ib.*

INTEREST.

1. Where usurious or *compound* interest has been paid, the party cannot recover it back, or have it deducted, when sued for the principal debt.

Poydras vs. Turgeau, 34

2. And where the extension of the day of payment was *conditional*, depending on the punctual annual payment of the accruing interest, and the debtor fails to pay the interest punctually, still the creditor cannot sue for the recovery of the *principal debt and interest*, until the expiration of the extended time, without putting the debtor *in morà*..... *ib.*

INTERROGATORIES.

PAGE

1. Where interrogatories are propounded which may appear immaterial, yet when fraud is alleged, the court is not authorized to dispense with having them answered, when they are not clearly improper.

Cecile, f. m. c. vs. St. Denis, f. w. c., 184

JUDGMENT.

1. Three judicial days must elapse between taking judgment by default, and the day on which it is made final, or it will be reversed on an assignment of error.....*Johns & Co. vs. Boyle*, 268

2. Judgment may be rendered after the lapse of more than three days from that on which the verdict is found. The appellant complains with a bad grace that judgment was not rendered soon enough....*Gay vs. Ardry*, 288

3. Where a judgment states that it was rendered *on due proof* of the allegations in plaintiff's petition, in which the usual allegations are made, the reasons will be deemed sufficient.....*Bridge et al. vs. Bellow*, 435

4. The judgment alone of this court must have effect, and is the law, independently of any expression used *arguendo*.

* *Hill & McGunnege vs. Bowman*, 445

5. A judgment allowing part of the demand as *an ordinary debt*, is in *personam*, although the suit was by attachment for a privileged debt..... *ib.*

6. So, in a suit by attachment, the judgment is *in rem*, and *in personam* for the balance not covered by the property attached, on which a writ of *ca. sa.* may issue..... *ib.*

7. The allegation of fraud and collusion against a judgment, puts the party in whose favor it is rendered, to the proof of the facts on which it is based.....*Adams vs. His Creditors*, 455

8. Where there is a judgment of eviction decreeing the land to the plaintiff, and providing that she shall pay the defendant a certain sum for his improvements, before she takes possession, and the judgment fixes no time, the defendant may have execution immediately for the sum awarded him.....*Righter et ux. vs. Winter*, 548

9. A judgment on a petition for an order of seizure and sale of the mortgaged premises, which has been opposed, *without saying against whom*, for the whole amount of the plaintiff's claim, is insufficient to authorize a seizure and sale, under a *feri facias* issuing thereon.

Bailly, f. m. c. vs. Percy, f. w. c. 17

10. Where a judgment by default is confirmed after answer filed to the merits, with a prayer for a jury, it vitiates the proceedings, and the case will be remanded.....*French vs. Putnam et al.*, 97

JURISDICTION.

1. Where parties are in court whose jurisdiction has attached, they may be required to litigate all their claims there, relating to the property in controversy, although they reside in another state.

Frost & Johnson vs. Bebout et al., 104

2. A defendant cannot be cited to appear in a different jurisdiction from that in which he may be found, or resides at the time of bringing suit. In such a case, one District Court cannot issue process of citation to be served within the jurisdiction of another and a different court.

Gibson vs. Huie, &c., 129

3. A debtor, having no residence or fixed domicile in the state, may be sued wherever he is found; but suit must be brought in the court having jurisdiction over the place where he is found..... *ib.*

4. Where the widow sues to recover certain property under her marriage contract, which she alleges was given to her by her husband, but is withheld and sold by the administrator and heirs: *Held*, that it is an action to recover property under a title, and not a partition, and the probate court is without jurisdiction..... *Kerr vs. Kerr et al.*, 177

5. Where the court is without jurisdiction *ratione materiae*, no consent can give it, and the court is bound to notice it *ex officio*, even when no plea to the jurisdiction is filed..... *ib.*

6. Where heirs sue in the District Court, to recover from the purchaser property sold at the probate sale of their ancestor's estate, on the ground that the proceedings and sale of the Probate Court are illegal, and should be cancelled and annulled: *Held*, that this is in the nature of an action of nullity and the District Court is without jurisdiction.

Graham's Heirs vs. Gibson, 146

LEASE.

1. Where lessors received rent at a higher rate, after the annulment of the lease, they cannot be made to refund the difference, when it is not shown that the lessees did not consent to pay the higher rate of rent by a new lease..... *Hyde et al. vs. Goodrich*, 439

MANDAMUS.

1. If the judge of probates of the parish where the parties reside at the time, *refuse*, on the application of the tutrix, to appoint an under tutor to the minor children, and order a family meeting to relieve her property from a general mortgage, on giving a special one, a peremptory *mandamus* will be awarded requiring him to proceed.

State of Louisiana vs. Judge Bermudez, 478

2. It is the duty of the judge of the parish where the minor has his domicile, to appoint an under tutor as soon as a vacancy occurs..... *ib.*

MINORS.

1. The property of a succession which descends to and is inherited by the minor children, cannot be adjudicated to the surviving widow and mother, for less than its *appraised value*.....*Pipkin vs. Doiren*, 294

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MORTGAGES.

1. Where mortgages have ceased to exist by virtue of a probate sale, the fact that they still appear on the books of the recorder of mortgages, will not authorize the purchaser to withhold payment of the price.

Hoey, &c. vs. Cunningham, 86

2. In a proceeding by writ of seizure and sale, against mortgaged property which has passed into the hands of a third possessor, *three days notice* must in all such cases be given to the defendant, after seizure, before the property is advertised for sale.....*Saillard vs. White*, 34

3. Where the vendor promised to cause the general mortgages existing on certain lots at the time of sale to be erased and cancelled, and it is ascertained that they are already extinguished by the probate sale, and the want of re-inscription for more than ten years, the purchaser cannot excuse himself from paying the purchase money for want of the erasure.

Gravier's Heirs vs. Hodge, 101

4. When it is shown the mortgages were all previously extinguished by probate sale, and for want of a re-inscription, the *promise* to have them erased from the books of the mortgage office is vain, and creates no obligation..... *ib.*

5. So, when judicial or conventional mortgages are extinguished by a probate sale, or for want of a new inscription at the end of ten years, the recorder of mortgages should *note* them on his books, and not include them in his certificates as existing..... *ib.*

6. Where property is sold at probate sale for less than the sum for which it is mortgaged, the mortgage creditor can only be placed on the tableau with a privilege for the amount of the sale; and for the balance of his claim he must be set down as an ordinary creditor.....*Baldwin vs. Criswell*, 166

6. A mortgaged creditor is entitled to a writ of sequestration against the mortgaged property, whenever he apprehends it will be removed out of the state before he can have the benefit of his mortgage; and in such cases, a writ of sequestration can be granted in the absence of a principal demand pending before the court granting it.....*Williams vs. Duer*, 531

NOVATION.

1. Where the seller delivered up the notes of the purchaser which he had received for the price, in exchange for the notes of other persons, the debt due by the purchaser was thereby novated; and his warranty does not extend to the solvency of the makers and endorsers of the notes given in exchange.....*Barthel vs. Andry*, 30

NULLITY.

1. The nullity resulting from a prohibited sale to executors of property of the succession administered by them is *absolute*. No subsequent ratification can give it effect against third persons *interested*, who are not parties to the ratification.....*Scott's Executrix vs. Gorton's Executor*, 115
2. The ratification of an absolute nullity can have no retroactive effect, but is a new title, and cannot prejudice the rights of third parties previously acquired, whilst a relative nullity relates to the original act..... *ib.*
3. The nullity of a probate sale cannot be sought in a direct action in the District Court. The order of sale by the Probate Court is held to be a judgment which protects purchasers under it....*Graham's Heirs vs. Gibson*, 146
4. So, where heirs sue in the District Court, to recover from the purchaser and third possessor of property sold at the probate sale of their ancestor's estate, on the ground that the proceedings and sale by the Court of Probates were illegal, and should be cancelled and annulled: *Held*, that this is in the nature of an action of nullity, and the District Court is without jurisdiction..... *ib.*

OBLIGATION.

1. Where the purchaser and ten other persons bound themselves *jointly*, to reimburse the seller the amount of certain notes given to him, if not paid at maturity, each one will only be liable for his proportion of the loss.....*Barthel vs. Andry*, 30
2. So, where the purchaser, supposing himself bound *in solido*, when he was only *jointly liable* with others, made a contract for the payment of the whole claim under this belief: *Held*, that it was an error of law, and he is entitled to be relieved from his obligation..... *ib.*
3. Where an undertaker gave an order to his plasterer, on the owner, payable out of the second and third instalments of the price of building, when the house was finished, which was accepted: *Held*, that no subsequent agreement between the undertaker and owner, prolonging the time of finishing the house, could change the obligation of the acceptor of the order, although the house was destroyed by fire in the meantime.

Sargeant vs. Daunoy, 43

4. Neither party to a contract has any power to change his obligations to a third party growing out of said contract, by subsequently altering or prolonging its execution as between themselves..... *ib.*

PARTITION.

1. In an action for a partition, a judgment in the Court of Probates fixing the rank and portion of heirs inheriting a succession, is *res judicata* when not appealed from, and no one of them can be deprived of his share in a subsequent suit..... *Hook vs. Hook et al.*, 22
2. A licitation made to effect a partition is not a sale *as between the heirs*, and does not change the character of the thing to be partaken. The proceeds of real estate represent it, and *are really*..... *ib.*
3. If the heir reside in Louisiana, the proceeds of *real* property situated in the state, sold to effect a partition, are *real*, and will descend, according to our laws, to the heirs as real estate..... *ib.*

PARTNERSHIP.

1. In all associations or contracts, the partners or parties in interest, must be made parties to all suits instituted on the contract or association.
Allard et al. vs. Orleans Navigation Company, 27
2. So, where a portion of the shareholders of the Pontchartrain Lake Road Company sued for an infringement of their contract with the defendants: *Held*, that all the shareholders or parties in interest must be made parties to the suit..... *ib.*
3. Partners doing business as "*wood merchants, and running drays for hire*," constitute a commercial partnership, and are bound *in solido* for the obligations of the firm..... *Hubbell vs. Read* 243
4. Service of citation on one partner of a particular partnership is insufficient to bring all the partners into court..... *M^cGehee vs. M^cCord et al.*, 362
5. Several persons associating themselves under a particular style and firm, for the purpose of constructing a rail-road, although they draw bills of exchange in the mercantile form, will be considered as forming an ordinary or particular partnership..... *ib.*
6. Particular partnerships are joint, and the obligations of the firm bind the partners *jointly* only, who must be sued together, and service of citation made on each and every partner..... *ib.*
7. A member of a commercial partnership may constitute the firm his attorney in fact, to endorse his name on notes payable to his order, in his absence..... *Sanderson vs. Oakey et al.*, 373
8. In relation to property acquired by illicit traffic, a partner stands in a different light from creditors; they claim to be paid out of the general assets of their debtor; the partner seeks for one half of the property unlawfully acquired, and cannot be listened to..... *Adams vs. His Creditors*, 454



9. When there is no evidence to the contrary, the owners of a steam-boat will be deemed commercial partners, and bound *in solido* for her debts.....*Shaum vs. Strong*, 491
10. So, where the captain gave his due bill to the engineer of a steam-boat for a balance of wages due him, the defendant, as one of the owners, was held liable for the amount of the claim..... *ib.*

PLEDGE.

1. Where bank stock is pledged to secure a debt due to the bank, and is afterwards transferred in payment at its full value, although made on the eve of insolvency, it does not prejudice other creditors, and is not fraudulent as to them.....*Caldwell et al. vs. Atchafalaya Bank*, 308

POLICE JURY.—SEE PUBLIC WORKS.

PRACTICE.

1. In all cases, where suits are instituted by associations, or partnerships, the parties or partners in interest, must be made parties to the suit on the contract or act of association. A portion of the partners, or shareholders, cannot maintain an action without joining all.
Allard et al. vs. Ocean Navigation Company, 27
2. Where the legality of issuing an order of seizure and sale has been passed upon, in an opposition made by the defendant, the court will take no further action on the matter, when brought up on a rule to show cause why an *alias* order of seizure should not be set aside.....*Florance vs. Wilcox*, 58
3. If, on an examination of the record, the appellant appears to be entitled to relief, the court will award it according to the nature and justice of the case.....*Painpaie vs. Martin*, 59
4. So, where by the record it appeared the verdict was entered for "six hundred dollars, or the return of a note, &c.," upon which judgment was rendered for "six hundred dollars, to be satisfied by the return of the note, &c.," and the evidence showed that it should be for "six hundred dollars, and the return of the note, &c.," this court gave judgment accordingly..... *ib.*
5. A sheriff's account for fees and charges need not be proved, when not contested or required by the court. The law provides that the fees for keeping personal property and slaves, taken under legal process, shall be at the discretion of the court.....*Avart vs. King et al.*, 62
6. After an answer to the merits, the plaintiff cannot proceed to take judgment *ex parte*, without setting the cause for trial, because the defendant merely neglected to answer interrogatories, which were taken for confessed. He can only avail himself of the confession *as proof* on the trial.
Behan vs. Hite, 67

7. In a collision between a steam-boat and flat-boat, by which the latter and its cargo were lost, and the weight of testimony going to show the fault was with the former, the owners thereof were held liable for the loss.

Vanlandingham vs. Achison et al., 73

8. Also, in a contest about the occupation of leased premises, which is submitted to a jury, it is properly a question of fact; and the verdict being justified by the evidence, it will not be disturbed, although against both parties.....*Palfrey vs. Scates & Baggett*, 79

9. Where judgment by default is confirmed and made final, after answer filed and prayer for a jury without a trial, it vitiates the proceedings, and the case will be remanded.....*French vs. Putnam et al.*, 97

10. A prayer by the appellee to amend the judgment in his favor, comes too late when only filed on the day the cause is set for argument.

Gibson vs. Huie &c., 129

11. Where a defendant *avers* that a certain note held by him and attached in the hands of the makers was transferred by him before service and notice of the attachment, and *fails to show this*, it will be taken for granted he was still in possession..... *ib.*

12. Where a re-hearing is granted only on a particular branch of a cause, no other part of it can be examined on the second trial.

Hopkins et al. vs. Laplace, Syndic &c., 144

13. In an action of slander of title, claiming damages, it is not necessary to allege and show that the defendant is in possession; and his exception disclaiming possession and title will not authorize the dismissal of the suit. The plaintiff has the right to try the issue of slander of title, and to show damages if he can.....*Hewitt vs. Seaton et al.*, 159

14. The signature of a constable to a return of service of citation made by him, will be taken as true, without proof being made of it.

Graham's Heirs vs. Gibson, 146

15. Where the allegations in the petition are vague and insufficient, they may be rendered certain by the averments in the answer, and evidence admitted under them in aid of the plaintiff's case, which would have been excluded for want of proper allegations.....*Burland vs. Carrollton Bank*, 189

16. A sale having all the forms of a legal sale by authentic act, cannot be treated as a nullity, even if fraud is alleged..... *ib.*

17. Questions of fact, and the assessment of damages, are peculiarly subjects for the consideration of a jury.....*Martin et al. vs. Nally*, 205

18. In a case involving facts only; and there being no positive evidence of the facts as alleged, this court refused to disturb a verdict in the negative.

Williams vs. Lanier, 210

19. Where a cause has been laid over from day to day until the last day of the term, the defendant will not be allowed to delay the trial, in order to attach his witnesses; but will be ordered to proceed in the trial unless he discloses and shows the materiality of their testimony.....*Raby vs. Brown*, 247
20. A simple denial of the plaintiff's right to sue as the holder of a negotiable note or instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or mislaid.....*M'Kinney vs. Beeson's Estate*, 254
21. A party pleading minority, and it is shown that he is near the age of majority, he must clearly make it appear that he was a minor at the time of the contract, or his plea will not avail him.....*Davis vs. Coan*, 257
22. Where the defendants are interrogated as to the consideration of the note sued on, and neglected to answer; their silence must be taken *pro confessis*, and it will be deemed full proof...*Polo & Tivillier vs. Natili et al.*, 260
23. It is not a valid objection to testimony that two witnesses were examined together, and made oath to the same facts, in the same deposition. There is no law prohibiting a joint examination of witnesses, and taking their joint testimony in one deposition.....*Clark vs. Clark et al.*, 270
24. A party has no right to interrogate a juror, on oath, whether he understands the English language.....*Gay vs. Ardry*, 288
25. The plea of the general issue admits the signature of the maker of the note sued on.....*Vairin et al. vs. Palmer*, 361
26. Whatever might have been cured by evidence or admission in the court below, cannot be assigned as error apparent on the record.
Nott et al. vs. Brander et al., 368
27. When the certificate to the record shows that it contains all the evidence adduced on the trial, the appellant may at any time call the attention of this court to any error on the face of the record; or try the case on the merits without any assignment at all..... *ib.*
28. The plea of the general issue and compensation by the maker of a note, is an admission of the plaintiff's title to sue on it.
Rost et al. vs. Byrne, 372
29. It is no ground of complaint that the cause was tried *ex parte* when the defendant neglected to attend.....*Thayer et al. vs. Rieder*, 383
30. Where the error assigned, might have been cured by evidence, it will not avail the party..... *ib.*
31. Where a plea in compensation and reconvention is sustained by the evidence, judgment will be given against the plaintiff for the balance due after extinguishing his demand with interest.....*Zeringue vs. Rixner*, 385

32. Immaterial amendments, even if erroneously allowed, or rejected, where they cause no injury or prejudice to the party, will not be allowed to interfere with the judgment, or cause its reversal in this court.

Rio vs. Gordon et al., 418

33. Where the appellant may reasonably have had doubts of the correctness of the judgment below, he will not be condemned to pay damages..... *ib.*

34. An exception to the *suit*, alleging that the plaintiff has shown no cause of action, must be first considered independently of any other matter of defence *Martin vs. M-Masters*, 420

35. A party seeking to recover, must make his claim certain; it is not enough to render it only probable..... *Adams vs. His Creditors*, 454

36. The ten days allowed for the defendant to answer in, are not required to expire *before* the commencement of the term to which he is cited. As soon as they expire, if the court is in session, the plaintiff may proceed to take judgment by default if the answer is not put in.

Maurin et al. vs. Dashiell, 471

37. Notice of trial may be served on the *counsel* of the defendant, and it is sufficient..... *Dwight et al. vs. Scates*, 495

38. An injunction case, when the answer is in, may be set for trial pending a rule to show cause why the injunction should not be dissolved, and on the day fixed for the trial of the rule..... *Williams vs. Duer*, 523

59. If, in the answer to an opposition against an order of seizure and sale, the party sets up matter different from that in his original petition, or which amounts to a replication, it may be disregarded..... *ib.*

40. The Union Bank did not lose its capacity to sue and stand in judgment, by the suspension of specie payments.... *Union Bank vs. Mortee*, 541

PRESCRIPTION.

1. Suit by a single creditor to annul a contract, on the ground of *undue preference* to another creditor, is prescribed by one year.

Caldwell et al. vs. Atchafalaya Bank, 308

2. But the revocatory action may be brought within the year by a creditor from the date of his judgment against his debtor, or by a syndic representing all the creditors, within a year from the date of his appointment, *to set aside all contracts* of the insolvent debtor by which creditors are injured..... *ib.*

3. The wages of an overseer are prescribed after the lapse of three years from the time the services are rendered, notwithstanding they may have been continuous from the commencement to the time of instituting suit..... *Cresap vs. Winter*, 553

4. Where suit is for six years wages of an overseer, prescription bars so much as has not accrued within the last three years before bringing suit.... *ib.*

5. The right of passage, and to use an open space in a town, as a public alley or street, is not acquired by prescription.

Crossman et al. vs. Vignaud et al., 173

PRINCIPAL AND AGENT.

1. An agent receiving drafts, and engaging to make title as soon as he has collected them, undertakes to present them for payment and account to the other party for them, or show that one or more of them remained unpaid before he is exonerated from his obligation.....*M. Allister vs. Srodes*, 442

2. An agent is bound to administer proof of his performance of the obligation resulting from his agency..... *ib.*

PUBLIC WORKS AND PLACES.

1. The police jury may recover from the owner the value of repairs put on his plantation or property, in making levees and roads that are useful and necessary. A failure to give notice cannot defeat this action; it is founded on the great principle of equity, that no man shall profit by the labor of another, *without compensation*. (*Police Jury vs. Hampton*, 5 *Martin, N. S.*, 389, 398.).. *Police Jury of Pointe Coupée vs. Smith's Syndics*, 68

2. An open space had been used as an alley or public street, in the town of Natchitoches, for upwards of thirty years, but was not shown to have been designated as such on the plan of the town, or by destination to public use: *Held*, that it remained private property, and as such was held by the defendant's title.....*Crossman et al. vs. Vignaud et al.*, 173

3. The right of passage, and to use an open space in a town, as a public alley or street, is not acquired by prescription. It is an interrupted servitude, which requires the act of man to be exercised, and can be established only by a title..... *ib.*

REDHIBITION.

1. In a redhibitory action for the rescission of the sale of a slave, when the evidence leaves it doubtful whether the disease, of which the slave was afflicted, originated before or after the sale, and the jury find for the defendant, their verdict will not be disturbed.....*Barnett vs. Macoin*, 428

2. A slave may appear perfectly healthy at the time of sale, and yet be afflicted with a redhibitory disease, rendering her valueless, and which does not come within the law providing for defects discoverable on simple inspection.....*Herries vs. Botts*, 432

3. A disease, although not known at the time, which renders a slave so valueless that it must be supposed the owner would not have purchased her had he known it, is a redhibitory one, which authorizes a rescission of the sale and return of the price..... *ib.*

REMOVAL OF CAUSES.

1. Where a corporation existing in another state is sued by attachment here, it is sufficient for such defendants to present a petition in compliance with the twelfth section of the judiciary act of 1789, and allege that the corporators are all and each of them, citizens of another or other states, or aliens, in order to have the cause removed to the United States Court.

Oakey et al. vs. Commercial and Rail Road Bank of Vicksburg, 515

2. In an application for the removal of a cause to the United States Court, the State Court has no authority to inquire into the truth of the allegations in the petition. It is sufficient, and the record must show, that the defendants are citizens of another state, or aliens..... *ib.*

RES JUDICATA.

1. A judgment rescinding an order of seizure and sale on account of the insufficiency of the authentic evidence on which it was granted, but without prejudice to the creditor's rights in any other remedy he might seek, cannot be pleaded as *res judicata*, or in bar of an action in the *via ordinaria*.

Police Jury of Pointe Coupée vs. Smith's Syndics, 68

2. Where the defendant in eviction calls his vendor in warranty, demanding the return of the *price*, and the value of the improvements, with a prayer for general relief; and has judgment accordingly on this issue, it forms *res judicata* in a subsequent action for the increased value and price of the land and improvements..... *Vascocu's Widow and Heirs vs. Parie*, 135

3. Where a judgment of a court of competent jurisdiction stands unappealed from, and is final, it is conclusive on all matters embraced in it; whatever may be the errors or injustice done by it, it forms *res judicata*, and cannot be re-examined..... *Patterson vs. Bonner et al.*, 214

4. Proceedings had *ex parte*, going to homologate a tutor's account and grant a final discharge, when there is no opportunity given to the heir at law to contest the account, are illegal, and do not form *res judicata*, when the tutor is called on to render his account by the heir of the deceased pupil..... *Gillespie vs. Day*, 289

5. The judgment of homologation of a tableau of distribution so far as it settles the rank and privilege of creditors is final, and is *res judicata*, so far as relates to their *rank*, in all subsequent tableaux.

Lang et al. vs. Their Creditors, 241

SALE.

1. A sheriff's sale, which recited that it was made in pursuance of a certain judgment, which, in fact, did not exist as set forth, was held to be defective, and conveyed no title to the purchaser.

Bailly, f. m. c. vs. Percy, f. w. c., 17

2. The sale by the sheriff is the last act under the judgment and execution, and fixes the condition of the purchaser under it.

Bailly, f. m. c. vs. Percy, f. w. c., 17

3. Where a sheriff's sale purported to transfer all the *right, title and interest*, of a particular defendant in execution, to the purchaser, and it appeared this defendant was not a party condemned in the judgment, *by name*, and was not, in fact, the true owner of the property seized, the sale was held to be bad, and conveyed no title..... *ib.*

4. A licitation made to effect a partition, is not a sale as between the heirs, and does not change the character of the thing to be partaken. The proceeds of real estate represent it, and are realty.

Hooke vs. Hooke et al., 22

5. Where a probate sale is attacked as fraudulent, null and void, and the matter is left to a jury, who, in their verdict, treat the sale as a nullity, which is supported by evidence, the purchaser cannot avail himself of title, or have any recourse, in warranty, against the heirs of the deceased owner..... *Webb vs. Gorman et al.* 88

6. Where sales are shown to be simulated, the property will be declared to belong to the original owner..... *Champagne vs. Champagne's Syndic,* 51

7. In a sale with a defeasible condition, (*vente à réméré*), it rests solely on the will of the vendor to dissolve the contract, and his expression of that will must have the same effect as the will of both parties in creating the contract..... *Patterson vs. Bonner et al.,* 214

8. So, where the vendor in a sale, with a defeasible condition, in the presence of two witnesses, offered to repay the price, and redeem the property within the time limited, which was refused, and he made no consignment of the money: *Held*, that this was a sufficient notification to the vendee of the intention to redeem, and preserve to the vendor the right of action to dissolve the contract after the term had elapsed. *ib.*

9. Although the right of redemption is preserved to the vendor of his intention and readiness to redeem within the time limited, yet without a consignment or tender of the money, he is not entitled to the fruits or profits..... *ib.*

10. In a *vente à réméré*, where the vendee has possession, and enjoys the fruits or profits of the property, a stipulation to pay ten per cent. interest, on redemption and re-payment of the price, will be deemed illegal..... *ib.*

11. A sale of property inherited by a minor, ordered by a family meeting not convoked for that purpose, and which is not shown to be necessary, is null and void, and will be set aside, on an opposition to a motion for its confirmation..... *Morris et al vs. Kemp,* 251

12. A family meeting, convoked for specific and different purposes, is without authority to order a sale of property inherited by a minor, whose interests they are called on to protect..... *ib.*

13. A sale to effect a partition is null, if the formalities required by law are not complied with. *Pipkin vs. Thompson*, 272

14. A sale of slaves by authentic act, cannot be attacked collaterally, or considered as fraudulent and be disregarded. It can only be set aside by a revocatory action..... *Morton vs. Crosby et al.*, 424

15. Where several lots are sold in block, designated by numbers in a particular square, according to a plan, although the number of feet contained in each is specified, it is a sale *per aversionem*. The reference to the plan and boundaries of the streets must control the measurement of the lots..... *Kirkpatrick vs. M-Millen et al.*, 497

16. In a sale *per aversionem*, notwithstanding the deficiency in the superficial quantity, the purchaser cannot claim a diminution in price *ib.*

17. The remedy given to the owner of property to prosecute the *folle enchère*, or purchaser failing to comply with his bid, is cumulative. He may elect to prosecute the purchaser for a specific compliance with the terms of sale, or for damages, or he may proceed to a re-sale, at the risk of the first purchaser..... *Municipality No. 2 vs. Hennen*, 559

18. The vendor in prosecuting the *folle enchère* cannot recover the difference between the first and last sale, if he bids in his own property..... *ib.*

13. So the legal owner, or mandatory of the owner, who is alone interested in a sale at auction, is equally incompetent to purchase property at such sale; and so far as the *folle enchère* is concerned, the sale is null and void..... *ib.*

14. Where a part of the calls and boundaries expressed in a deed are inconsistent with the stipulations in the contract of sale, and impossible to be complied with, they will be disregarded..... *Marshall vs. Fogleman*, 151

SEQUESTRATION.

1. The article 276, of the Code of Practice, pre-supposes that the affidavit in a case of sequestration, is to be made by the plaintiff; and when he is present, and no proper cause assigned to prevent him, the affidavit of the agent will not be sufficient..... *Hawley vs. Tarbe et ux.*, 92

2. An affidavit in which the plaintiff states, that "*he fears* the defendant may remove the mortgaged slave out of the jurisdiction of the State," is insufficient to obtain an order of sequestration. He should state the facts which induce his apprehension,..... *Clark vs. Glover et al.* 266

3. The plaintiff, in obtaining an order of seizure and sale against the mortgaged premises, acquires a *lien* on the growing crop, from the moment of notification of the order of seizure to the defendant; and he may obtain a writ of sequestration against the crop during the pendency of a suspensive appeal from the order of seizure and sale, and in the absence of any principal demand before the court at the time of granting the sequestration,..... *Williams vs. Duer*, 531

4. A mortgage creditor is entitled to a writ of sequestration against the mortgaged property, whenever he apprehends it will be removed out of the state, before he can have the benefit of his mortgage; and in such cases a writ of sequestration can be granted in the absence of a principal demand pending before the court granting it.....*Williams vs. Duer*, 531

SERVITUDE.

1. The estate below owes a servitude to that above it, to receive the waters which naturally flow from the upper estate, and the proprietor below is not at liberty to raise a dam, or make any work to prevent this running of the waters; but this must be a natural servitude, not created by the industry of man,.....*Lattimore vs. Davis*, 161
2. The clearing of land and fitting it for agriculture, by cutting ditches and canals, cannot be considered as making this servitude more onerous, if it pursues the natural drains,..... *ib.*
3. But where the proprietor of the upper estate cuts ditches, and makes drains on to the lower one, without following the natural drains and flow of the waters, he will be liable for all damages sustained by the overflow of the waters,..... *ib.*
4. The right of passage, and to use an open space in a town as a public street or alley, is not acquired by prescription. It is an interrupted servitude which requires the act of man to be exercised, and can be established only by a title.....*Crossman et al. vs. Vignaud et al.*, 173

SHERIFF.

1. When a sheriff acts honestly, being a public officer, he must be protected against excessive and vindictive damages.
.....*Smith vs. Bradford et al.*, 281
2. So, where the sheriff illegally removed slaves by seizure from the plantation they were cultivating, a bare remuneration for the loss sustained, so far as it can be ascertained, should be adopted as the measure of damages..... *ib.*
3. The damages for loss of time of slaves by illegal seizure and removal, should be estimated at the usual rates of hiring slaves..... *ib.*
4. A sheriff's account for fees and charges need not be proved when not contested or required by the court. The law provides that the fees for keeping personal property and slaves taken under legal process by the sheriff, shall be at the discretion of the court.....*Avart vs. King et al.*, 62

SLANDER.

1. In actions of slander, when the words spoken are uttered with the intent to defame and injure the plaintiff in his business and livelihood, the law authorizes a recovery in damages for the injury sustained, without showing special damages..*Guice vs. Harvey*, 198

2. The jury have no fixed rule in assessing damages in cases where the words are actionable. They may take into consideration the trouble and inconvenience which the plaintiff has been at in seeking relief, as making part of the injury sustained.....*Guice vs. Harvey*, 198

SURETY.

1. The surety, to entitle himself to the right of discussion, must pursue the formalities pointed out in article 3016, of the Louisiana Code, or his plea will be overruled.....*Allen vs. Petrovic et al.*, 165

2. Sureties are not bound to show they had funds at the place of payment to meet the note at maturity. It is incumbent on the maker to provide funds.....*Fort vs. Cortes & Laplace*, 180

3. The sureties may oppose the want of demand of payment at the place specified, as an exception to the action against them. They may oppose to the action all the exceptions allowed to the maker, and which are inherent to the debt..... *ib.*

3. The surety in a sequestration bond, must reside, and have his domicile in the parish where the suit was instituted, or the sequestration will be set aside, if the adverse party asks for it.....*Gossett vs. Cashell*, 245

TUTOR.

1. Proceedings had *ex parte*, homologating a tutor's account, when there is no opportunity given to the heir at law to contest the account, are illegal, and do not form the exception of *res judicata*, when the tutor is sued by the heir of the deceased pupil to render an account.
Gillespie vs. Day, 289

VERDICT.

1. A verdict for the dissolution of a partnership, when that part of the plaintiff's prayer is not expressly objected to by the defendant, cannot be complained of; and, when supported by testimony rejecting his claim in reconvention, the verdict will not be set aside.....*Peire vs. Martin*, 64

2. The misconduct of a juror, will not be deemed sufficient ground to set aside the verdict, if, from the evidence, the court believe impartial justice has been done..... *ib.*

3. Where damages are complained of as excessive, the assessment of them are considered so peculiarly the province of the jury, that the verdict will not be disturbed, without evident grounds.
Quartrevaux vs. Caboche, 366

4. A verdict which gives interest from judicial demand, is sufficiently certain, as the record specifies the day when interest commences.
Gay vs. Ardry, 288

5. A verdict "for the plaintiff," without specifying any sum, is defective and illegal, when the suit is for a money demand, and will be set aside.

Collings vs. Hamilton, 343

6. The Supreme Court, on setting aside the verdict of a jury, will render final judgment in the case, if the evidence and facts in the record enable it to do so..... *ib.*

7. The verdict of a jury on mere matters of fact, brought out by the answers of the parties to interrogatories propounded to each other, will not be disturbed without good ground..... *Barton vs. Hoff*, 348

8. Questions of fact, and the *quantum* of damages in actions of slander, are so peculiarly the province of the jury, that their verdict will not be disturbed unless manifest injustice has been done..... *Howe vs. Fraser*, 375

9. It does not necessarily follow that a verdict is to be set aside on account of the admission of improper evidence; as where proof of notice to an endorser is not satisfactory, a verdict in his favor will not be disturbed..... *Briggs vs. Stafford*, 381

WILL.

1. A copy of a foreign will, authenticated only by an *ex parte* affirmation of an attorney in fact, is insufficient to authorize the judge of probates to register it in this State..... *State vs. Judge Bermudes*, 379

WITNESS.

1. The circumstance of a witness being the clerk to the plaintiffs, and brother to one of them, does not destroy or diminish his credibility.

Frost & Johnson vs. Bebout et al., 104

2. A notary public, who signed the protest, cannot be received as a witness to prove that no demand was made. A public officer who has given a solemn certificate in his official character, and under his seal of office, cannot be listened to as a witness to prove it false..... *Briggs vs. Stafford*, 381

3. Where a witness swears *positively* to a signature without being interrogated as to his means of knowledge, it is sufficient. It would be otherwise, if he was interrogated, and failed to give a satisfactory answer.

Dwight et al. vs. Scates, 495

